



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



U.S. 1105.7

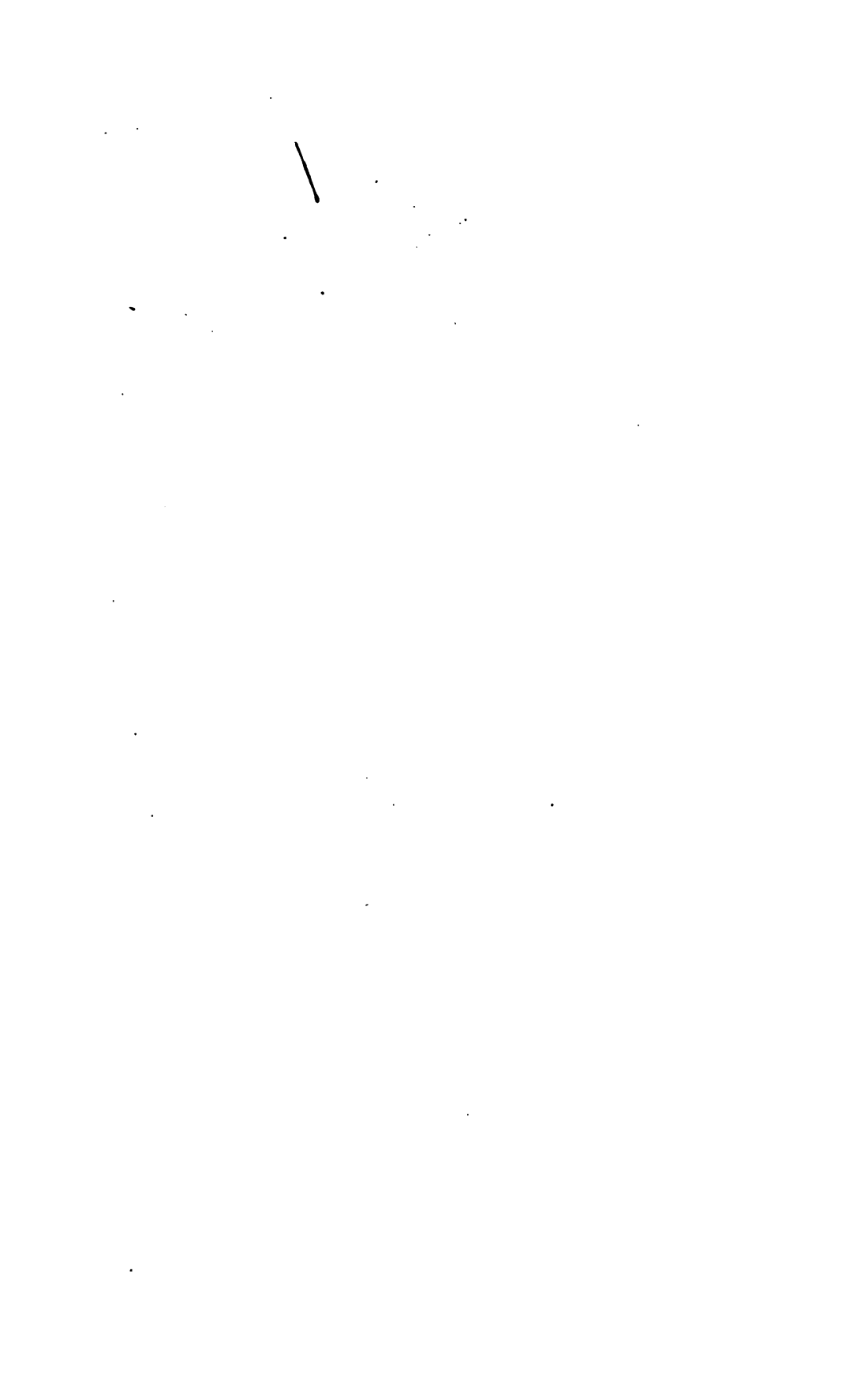
Bound
APR 13 190



Harvard College Library

FROM

Returned from the Law Library









2

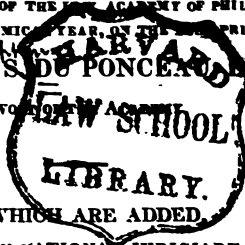
A DISSERTATION
ON THE
NATURE AND EXTENT
OF
THE JURISDICTION
OF THE
COURTS OF THE UNITED STATES,

BEING A VALEDICTORY ADDRESS

DELIVERED TO THE STUDENTS OF THE LAW ACADEMY OF PHILADELPHIA, AT THE
CLOSE OF THE ACADEMIC YEAR, ON THE 28TH APRIL, 1824,

BY PETER S. DE PONCEAU, LL.D.

PROVOST OF THE LAW ACADEMY



TO WHICH ARE ADDED.

A BRIEF SKETCH OF THE NATIONAL JUDICIARY POWERS EXERCISED IN THE UNITED STATES PRIOR TO THE ADOPTION OF THE PRESENT FEDERAL CONSTITUTION,

BY THOMAS SERGEANT, Esq. VICE PROVOST.

AND THE AUTHOR'S

DISCOURSE ON LEGAL EDUCATION,

DELIVERED AT THE OPENING OF THE LAW ACADEMY, IN FEBRUARY, 1821.

WITH AN APPENDIX AND NOTES.

The great system of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies, and each of them, as I have fully persuaded myself, is reducible to a few plain elements.—JONES. *Law of Bailments.*

PHILADELPHIA:

PUBLISHED BY ABRAHAM SMALL.

1824.

LS 1105.7
~~6374.23.3~~

1262
13

1876, March 31.
Received from the
author of the

Eastern District of Pennsylvania, to wit:

BE IT REMEMBERED, That on the seventh day of June, in the forty-eighth year of the independence of the United States of America, A. D. 1824, Peter Stephen Du Ponceau, of the said District, hath deposited in this office the Title of a book, the right whereof he claims as Author, in the words following, to wit:

"A Dissertation on the nature and extent of the Jurisdiction of the Courts of the United States, being a Valedictory Address delivered to the students of the Law Academy of Philadelphia, at the close of the academical year, on the 22d April, 1824, by Peter S. Du Ponceau, LL.D. Provost of the Academy. To which are added, A brief sketch of the National Judiciary Powers exercised in the United States prior to the adoption of the present Federal Constitution, by Thomas Sergeant, Esq. Vice Provost. And the author's Discourse on Legal Education, delivered at the opening of the Law Academy in February, 1821. With an Appendix and Notes. The great system of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies, and each of them, as I have fully persuaded myself, is reducible to a few plain elements. Jones, Law of Bailments."

In Conformity to the Act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned."—And also to the Act, entitled, "An Act supplementary to An Act, entitled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies during the Times therein mentioned," and extending the Benefits thereof to the Arts of designing, engraving, and etching historical and other Prints."

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.

Rec. July 25, 1824

TO
THE HONOURABLE
WILLIAM TILGHMAN, LL.D.
CHIEF JUSTICE OF THE SUPREME COURT OF THE COM-
MONWEALTH OF PENNSYLVANIA,
AND PATRON OF THE
LAW ACADEMY OF PHILADELPHIA.
RESPECTFULLY INSCRIBED BY
THE AUTHOR.

PREFACE.

THE questions which are the subject of the following Discourse, are some of the most important that have been agitated under the Constitution of the United States. In whatever way they may be finally determined by the competent authorities, the decision will have considerable influence on our general jurisprudence, and even on the ultimate shape which our federal Constitution may be destined to assume.

That there are implied, as well as express, powers granted by the Constitution of the United States to the national government, is what it is at this day impossible to deny or even to doubt. Some of those have already been acted upon, and are in the full course of actual exercise ; others are preparing to be carried into execution. It is too late now to controvert the doctrine of implied constitutional authority.

But while these implied powers are admitted on all hands to exist in the federal government to a greater or lesser extent, a question has arisen, whether it is competent for the judi-

cial department, whose sphere of action the Constitution has been peculiarly careful to limit and define, to assume rights to themselves by their decisions *à priori*, and to carry them *provisionally*, as it were, into effect, before the legislature has made any law upon the subject, or has given them the special authority which seems to be required. In other words, the inquiry is, whether the Federal Courts have a right independent of the people of the United States or their representatives, by virtue of some occult power supposed to be derived from the *common law*, to mould the Constitution as they please, and to extend their own jurisdiction beyond the limits prescribed by the national compact?

There would have been but little difficulty in solving this simple question, if, by a carelessness of expression unfortunately too common in our legal language, it had not been clothed in the ambiguous words *common law jurisdiction*, which have been the source of all the doubts and all the hesitation that it has produced, because it was not considered that these words are susceptible of a double interpretation, implying in the one sense, a jurisdiction perfectly lawful, and in the other a power in direct opposition to the letter and

spirit of our national charter ; so that the controversy has been to maintain or reject altogether, and in every sense, this *common law jurisdiction*, while a proper distinction would probably have reconciled all conflicting opinions upon the subject.

In order that this may be clearly understood, it is necessary to enter into some preliminary explanations. In England, the country from whence we have derived, not only our system of jurisprudence, but most of our civil and political institutions, there is a metaphysical being called *common law*, which originally was a code of feudal customs, similar to the *coutumes* which, until lately, governed the different provinces of the neighbouring kingdom of France, but which, by gradual steps, and by the force of circumstances has become incorporated and in a manner identified not only with the national jurisprudence, but, under the name of *Constitution*, with the political government of the country. The king's prerogative and the rights of the subject are alike defined and limited by the *common law*. The various and often conflicting jurisdictions of the different tribunals in which justice is administered are also said to be derived from it, although in many instances they are known to

be founded on gradual and successive assumptions of power ; but those having been established and consolidated by time are now become *common law*. This *ens rationis* is a part of every civil and political institution, and every thing connected with the government of the country, is said to be a part of it. Thus the law of nations, the law merchant, the maritime law, the constitution and even the religion of the kingdom, are considered to be parts and parcels of the *common law*. It pervades every thing, and every thing is interwoven with it. Its extent is unlimited, its bounds are unknown; it varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the Judges. It has experienced great changes at different periods, and is destined to experience more. It is from its very nature uncertain and fluctuating; while to vulgar eyes it appears fixed and stationary. Under the Tudors and the first Stuarts forced loans, wardships, purveyance, monopolies, legislation by royal proclamations, and even the Star Chamber and High Commission Courts, and slavery itself, under the name of *villenage*, were parts of the *common law*. At the revolution it shook off those unworthy fetters, and

assumed the character of manly freedom for which it is now so eminently distinguished.

Twelve Judges, who hold their offices during good behaviour, are the oracles of this mystical science. In a monarchy like England, which has no written constitution, but in which all the rights of the sovereign as well as the privileges of the people are to be deduced from the *common law*, those Judges are an useful check against the encroachments of the monarch or his ministers ; hence the common law and the judicial power are in that country almost objects of idolatrous worship. While the United States were colonies, they partook of this national feeling. The grievances which induced them to separate from the mother country were considered as violations of the *common law*, and at the very moment when independence was declared, the *common law* was claimed by an unanimous voice as the *birth right* of American citizens ; for it was then considered as synonymous to the British Constitution, with which their political rights and civil liberties were considered to be identified. In the dissensions that arose between the colonies and Great Britain, the *Constitution*, or the *common law*, which was the same thing, was appealed to in favour of the doc-

trines which the contending parties respectively maintained. It was, therefore, held by all in equal veneration, and by all cherished as their most precious inheritance.

The revolution has produced a different state of things in this country. Our political institutions no longer depend on uncertain traditions, but on the more solid foundation of express written compacts; the common law is only occasionally referred to for the interpretation of passages in our textual constitutions and the statutes made in aid of them, which have been expressed in its well known phraseology; but there ends its political empire: it is no longer to it that our constituted authorities look to for the *source* of their delegated powers, which are only to be found in the letter or spirit of the instruments by which they have been granted.

The common law, therefore, is to be considered in the United States in no other light than that of a system of jurisprudence, venerable, indeed, for its antiquity, valuable for the principles of freedom which it cherishes and inculcates, and justly dear to us for the benefits that we have received from it; but still in the happier state to which the revolution has raised us, it is a SYSTEM OF JURISPRUDENCE

and nothing more. It is no longer the *source* of power or jurisdiction, but the *means* or instrument through which it is exercised. Therefore, whatever meaning the words *common law jurisdiction* may have in England, with us they have none ; in our legal phraseology they may be said to be *insensible*. To them may be applied the language in which the common lawyer of old spoke of a title of the civil law : *In ceulx parolx n'y ad pas entendment*.*

But this immense change in the existing state of things has not been immediately perceived, nor its effects clearly understood. Therefore our tribunals have been vexed with questions and arguments about the extent of their *common law jurisdiction*, because it was not observed that all jurisdiction in the sense above explained was irrevocably gone. But old habits of thinking are not easily laid aside ; we might have gone on for many years longer confounding the English with the American common law, if cases had not been brought before the federal Courts, so serious in their nature, and apparently fraught with such dangerous consequences, that hesitation was produced, and the public attention was at last drawn to this important subject.

* 1 Blac. Com. 22.



if the federal Judges were to assume this power, there was no knowing where they might stop, that they would not only have an almost unlimited authority over the lives and fortunes of the citizens, but might, in a great degree, impair, if not destroy, the sovereignty of the States, which the Constitution had meant to preserve, and even had guaranteed. Great were the embarrassments which these questions produced; sometimes it was said that the common law was not the law of the United States in their national capacity, at other times that it was so in civil, but not in criminal cases; but no one seemed fully aware of the distinction between the common law considered as a *source* of jurisdiction, and as a *means* for exercising it. The Judges, however, unwilling to extend the limits of their authority, generally declined to assume this jurisdiction, justly considering that they were only to look for the extent of their powers to the Constitution and the laws made under it. But this opinion, correct as it was, was not unanimous, nor was it satisfactory to the profession, because in consequence of some *obiter dicta* of the Judges, it was understood in too wide a sense, and its application was carried to an extent which the Court had not probably contempla-

ted: a case of which they had full and complete jurisdiction given to them in the most express terms by the Constitution and the acts of the national legislature, was by the consent of all parties considered as out of the limits of their authority, and this exclusion was confirmed by the improvident sanction of a solemn judicial decree. On the whole, after so many decisions, this question of *common law jurisdiction* has remained and still remains as unsettled as before, several of the Judges in the last case of this description, which came before them, having expressed a wish that it should be fully and solemnly discussed.

I have endeavoured in the following essay to sift to the bottom this complicated question, and to establish sound and legal principles which may lead to the solution of all similar ones that may hereafter arise. I do not flatter myself to have fully succeeded in this arduous undertaking; I hope, however, that I have opened the way for its further and more successful investigation. The distinction which I have assumed between the common law as a *source* of power and as a *means* for its exercise is the foundation of my argument. From the common law considered in the first point of view, I contend that in this country no ju-

risdiction can arise, while in the second every lawful jurisdiction may be exercised through its instrumentality, and by means of its proper application.

Having thus, as I conceive, disarmed the common law of its only dangerous attribute, the *power giving capacity*, I have no hesitation in asserting that as a system of jurisprudence it is the *national law* of this Union, as well as that of the individual States. In this respect I consider it as perfectly harmless in a political point of view and as beneficial in all others. I shall not here anticipate the reasons which I have given for this opinion.

At the same time that I have bestowed upon the common law all the praise to which I think it justly entitled, I have been very free in my observations on the points in which I think it deficient. I have done so because I think it susceptible of being carried to the highest degree of perfection, and because I believe that the honor of producing this result is reserved to the jurists of the United States, and is an object well worthy of being pursued by them. Being no longer so intimately connected with our political existence, we are more at liberty to examine into the merits of this system and to correct its defects.

cial department, whose sphere of action the Constitution has been peculiarly careful to limit and define, to assume rights to themselves by their decisions *à priori*, and to carry them *provisionally*, as it were, into effect, before the legislature has made any law upon the subject, or has given them the special authority which seems to be required. In other words, the inquiry is, whether the Federal Courts have a right independent of the people of the United States or their representatives, by virtue of some occult power supposed to be derived from the *common law*, to mould the Constitution as they please, and to extend their own jurisdiction beyond the limits prescribed by the national compact?

There would have been but little difficulty in solving this simple question, if, by a carelessness of expression unfortunately too common in our legal language, it had not been clothed in the ambiguous words *common law jurisdiction*, which have been the source of all the doubts and all the hesitation that it has produced, because it was not considered that these words are susceptible of a double interpretation, implying in the one sense, a jurisdiction perfectly lawful, and in the other a power in direct opposition to the letter and


assumed the character of manly freedom for which it is now so eminently distinguished.

Twelve Judges, who hold their offices during good behaviour, are the oracles of this mystical science. In a monarchy like England, which has no written constitution, but in which all the rights of the sovereign as well as the privileges of the people are to be deduced from the *common law*, those Judges are an useful check against the encroachments of the monarch or his ministers; hence the common law and the judicial power are in that country almost objects of idolatrous worship. While the United States were colonies, they partook of this national feeling. The grievances which induced them to separate from the mother country were considered as violations of the *common law*, and at the very moment when independence was declared, the *common law* was claimed by an unanimous voice as the *birth right* of American citizens; for it was then considered as synonymous to the British Constitution, with which their political rights and civil liberties were considered to be identified. In the dissensions that arose between the colonies and Great Britain, the *Constitution*, or the *common law*, which was the same thing, was appealed to in favour of the doc-

be founded on gradual and successive assumptions of power ; but those having been established and consolidated by time are now become *common law*. This *ens rationis* is a part of every civil and political institution, and every thing connected with the government of the country, is said to be a part of it. Thus the law of nations, the law merchant, the maritime law, the constitution and even the religion of the kingdom, are considered to be parts and parcels of the *common law*. It pervades every thing, and every thing is interwoven with it. Its extent is unlimited, its bounds are unknown; it varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the Judges. It has experienced great changes at different periods, and is destined to experience more. It is from its very nature uncertain and fluctuating; while to vulgar eyes it appears fixed and stationary. Under the Tudors and the first Stuarts forced loans, wardships, purveyance, monopolies, legislation by royal proclamations, and even the Star Chamber and High Commission Courts, and slavery itself, under the name of *villénage*, were parts of the *common law*. At the revolution it shook off those unworthy fetters, and

assumed the character of manly freedom for which it is now so eminently distinguished.

Twelve Judges, who hold their offices during good behaviour, are the oracles of this mystical science. In a monarchy like England, which has no written constitution, but in which all the rights of the sovereign as well as the privileges of the people are to be deduced from the *common law*, those Judges are an useful check against the encroachments of the monarch or his ministers; hence the common law and the judicial power are in that country almost objects of idolatrous worship. While the United States were colonies, they partook of this national feeling. The grievances which induced them to separate from the mother country were considered as violations of the *common law*, and at the very moment when independence was declared, the *common law* was claimed by an unanimous voice as the *birth right* of American citizens; for it was then considered as synonymous to the British Constitution, with which their political rights and civil liberties were considered to be identified. In the dissensions that arose between the colonies and Great Britain, the *Constitution*, or the *common law*, which was the same thing, was appealed to in favour of the doc-



ed notes, giving comparative views of the laws of different countries on the various subjects which are treated of in the body of the work. We understand that his ninth volume is to contain an epitome of the laws of *Spain*. A great number of the works of eminent foreign authors, such as Roccus, Bynkershoek, Martens, Schlegel, Pothier, Emerigon, Valin, Jacobsen, and others have been translated by our jurists from various languages, and published, some of them with valuable notes. Two different translations have appeared of the French commercial code, and one of the criminal code, all with copious notes by different authors. Judge COOPER has published Justinian's Institutes, with a translation, and a large body of annotations, in which he ably compares the Roman system of jurisprudence with our own. All these things are hardly known, except by a few, even in this country. They nevertheless shew the inclination of our professional men to cultivate jurisprudence as a philosophical science, and the result may be easily anticipated.

As a farther evidence of this spirit, I must not omit to observe that Law schools, within these two or three years have been increasing in this country in an astonishing degree, and

the most exalted characters do not disdain to fill the professors chairs. In my first Address on the opening of the Law Academy of this city, I had occasion to mention the two professorships in the University of Cambridge in Massachusetts, and the school which had been established at Litchfield in Connecticut by the late Judge REEVES. These were at that time the only institutions of the kind known out of this State. They continue to flourish, the latter under the care of Judge GOULD, successor of Judge REEVES. Since then other similar establishments have arisen, from which the greatest benefits may be expected to our profession and to our science. In the Transylvania University at Lexington, in the State of Kentucky, I am informed that there is a chair of civil law, now or lately filled by Dr. BARRY, and one of common and statute law, under Mr. BLEDSOE. In the University of New York, the Hon. JAMES KENT, who, during so many years, distinguished himself as Chancellor of that State, and whose name and talents are and will be long in veneration among us, fills the lately established chair of Jurisprudence. At Baltimore, Professor HOFFMAN, and at Northampton, in the State of Massachusetts, Judge HOWE and Mr. MILLS,

member of Congress, lecture with success to considerable numbers of students. There may be other similar institutions which are not known to me ; no doubt there will be several more in the course of a few years, such is the rapid course that this country is taking in the pursuit of elegant and useful knowledge.


The opinions of English jurists and the decisions of English Judges so long regarded among us with implicit deference, are now scanned with greater freedom and with the spirit becoming an independent nation. Before the late revolution that spirit prevailed in a great degree in the colonial tribunals, particularly in the provinces that were under charter and proprietary governments, and the Judges shewed a disposition to accommodate the law to the local circumstances of the country. In the royal governments, for obvious reasons, the English system was more strictly adhered to. After the revolution, things went on much in the same course, until the adoption of the federal Constitution, when a Supreme Court was established, the Judges of which were indiscriminately taken from the States which had been under a royal government, and from those which had been governed under their charters and their proprietaries.

From that time there was perceived in the State as well as in the federal Courts a much more rigid adherence to English precedents. Perhaps the vain wish to introduce by that means uniformity throughout the Union, did not a little contribute to it. It was felt, however, and complained of by the people, and the consequence was that some of the States, as Pennsylvania Ohio, and New Jersey, prohibited by law the citing of British authorities posterior to the revolution. This was applying the axe to the root of the tree ; it was an ill judged and inefficient remedy, but at the same time a solemn warning to Judges and an indication of the manner in which the people wished the law to be administered, giving them to understand that the spirit of our own statute books, our national feelings, opinions, habits, manners and customs, were as much to be taken into consideration in their decisions as the letter of the English law. Indeed, when it is evident that our statutes, particularly ancient ones, have meant to make some radical alteration in the system of the common law, it seems that they should be construed with a view to the effect which they were intended to produce. The doctrine that statutes altering the common law are to be construed strict-

ly, has, I believe, been carried so far as in some cases to counteract the views of our legislatures, and the principles which they meant to establish.

This evil is gradually correcting itself, and the common law appears more and more dignified with *American features*. It is observed with pleasure that the opinions of Mr Chief Justice MARSHALL, are more generally founded upon principle than upon authority, and with the same satisfaction we see that Judge WASHINGTON, while he pays proper respect to modern English decisions, does not hesitate to reject those doctrines which to his discriminating mind do not appear consonant to our American system of jurisprudence, and thus proves himself to have inherited the spirit as well as the name and worldly estate of the father of the independence of his native land.

Thus, the law in this country, as every other science, tends to improvement. This laudable spirit requires only to receive a proper direction, which will, no doubt, be given by those who are more adequate than I am to this important task. In the mean time I have ventured to give a few hints to shew the importance of sound principles in a branch of knowledge on which our lives, our characters, and



our fortunes depend. The peculiar situation in which we are placed appeared to me to require it, as, unless we rally under the standard of principle, we shall be reduced to choose between a perpetual dependence on foreign opinions, and plunging into an inextricable labyrinth of confusion and uncertainty.

The common law contains within itself almost every thing that is requisite to raise it to the highest degree of perfection. It is fraught with excellent principles which only require to be methodised and properly applied. They are the foundation upon which authority rests, and unless they are constantly recurred to, the law will soon cease to be a science, and will not even be entitled to the name of a *system*.

This opinion might be supported by the authority of the greatest men that England has produced, among whom it would be sufficient to name the illustrious BACON. But I wish only to be permitted to quote a few lines from the excellent Sir WILLIAM JONES, which are so peculiarly applicable, that I cannot forbear inserting them here in his own words:

“ If law be a *science*, and really deserve so
“ sublime a name, it must be founded on *prin-*
“ *ciple*, and claim an exalted rank in the empire
“ of reason ; but if it be merely an unconnected

“ series of decrees and ordinances, its use may remain, though its *dignity* be lessened, and he will become the *greatest lawyer* who has the strongest habitual or artificial *memory*.*

I shall say no more upon this subject ; for

“ ’Tis enough—advent’rous to have touch’d

“ Light on the numbers of the *British* sage.”†

The day may come, however, and I hope it will come, when his voice will be responded to from one end of this vast continent to the other.

A few words more will conclude this preface.

I am under great obligations to my friend, THOMAS SERGEANT, Esquire, late Attorney General of the State of Pennsylvania, and who shares with me in the labours of this institution, for his excellent sketch of the national administration of justice prior to the adoption of the present federal Constitution, which he has kindly permitted me to subjoin to this Essay. It will be found in the Addenda. I am also much indebted to his valuable work on Constitutional law.‡ It enabled me to take that comprehensive view of our Constitutional jurisprudence, which I could not otherwise have

* Law of Bailments.

† Thomson.

‡ Constitutional Law ; being a collection of points arising upon the Constitution and jurisprudence of the United States, which have been settled by judicial decision and practice. By Thomas Sergeant, Esq. Philadelphia, Small. 1823. 415 pp. 8vo.

obtained without much laborious research. This book in my opinion, ought to be found in the library of every American lawyer.

Nor can I omit mentioning the Annual Law Register of the United States, lately published by the Hon. WILLIAM GRIFFITH.* The condensed view which it gives of the variations from the English law which now exist in the different States of this Union, is of immense value to the student of *American Jurisprudence*. It is time that the common law should gradually conform itself to the *national spirit*. When certain principles have acquired an undoubted ascendancy through the whole or a great majority of the States, they should give tone and colour to the national system, in preference to the maxims of the jurists of a distant and a foreign country. The knowledge of these principles can only be acquired by studying the common and statute law of the different States, for which purpose I consider such collections as that of Mr. Griffith to be invaluable.

At the request of several friends I have republished in the Addenda, the discourse which I delivered on the subject of legal education

* Annual Register of the United States, by William Griffith, counsellor at law; vols. 3d and 4th. Burlington, New Jersey, 1822.

at the opening of the Law Academy in 1821. I hope it will not be thought here out of place.

Considering this Essay as a partial commentary on the Constitution of the United States, I have thought it necessary to insert in an Appendix the text of the instrument, for the sake of immediate reference. I have likewise inserted the decisions of the Judges in the five principal cases to which this dissertation refers, and a denunciation of the common law by the general assembly of Virginia, to which this Essay may be in part considered as an answer.

Before I conclude, I would observe, that whenever, in the course of the ensuing address, I make use of the familiar expression "*common law jurisdiction*" as appertaining to the Courts of the United States, I always mean jurisdiction *of* and not *from* the common law. In this sense I have said (page 70) that the Courts of the District of Columbia have *common law jurisdiction*, by which I only meant to say that they have a right to administer the common law in the exercise of their jurisdiction over the territory or a part of it.

I now commit this little work to the candour and indulgence of my professional brethren.

TABLE OF CONTENTS.

INTRODUCTION.

	Page.
Cases which gave rise to the question of <i>common law</i> <i>jurisdiction</i> ,	
1. Worrall's Case, - - -	1
2. Burr's Case, - - -	5
3. Hudson & Goodwin's Case, - - -	7
4. Coolidge's Case, - - -	9
Observations on the decisions in these four cases,	13
Object of this work, - - -	16

THE ADDRESS.

Questions to be considered, - - -	17
_____ how to be stated, - - -	19
Jurisdiction, what it is, - - -	21
_____ <i>in locum</i> , - - -	23
_____ <i>in personam</i> , - - -	24
_____ <i>in subjectam materiam</i> , - - -	26
Laws are but the means through which jurisdiction is exercised, not the source from whence it springs, <i>ibid.</i>	
The Courts of the United States may take cognisance of offences at common law, when they have jurisdiction over the place, person, or subject matter, -	29
Illustrations of this doctrine—	
SECT. I. Of the Courts of the United States when exercising their jurisdiction in or for the con- federated States, - - -	31
1. Cases at Common law, - - -	35
Cases of the United States <i>v.</i> Worrall, and the United States <i>v.</i> Hudson & Goodwin, considered, -	50

	Page.
Has the federal government a right to protect its officers against insult and outrage? - -	51
Can the federal Legislature enact penal laws for that purpose? - - - -	53
Can the federal Courts protect them by the mere force of the common law? - -	54
Distinction between <i>imperative</i> and <i>potential</i> or <i>permissive</i> powers under the federal Constitution, -	57
2. Cases of admiralty jurisdiction, - -	57
SECT. II. Jurisdiction exercised without the limits of the States. Of ceded countries and places, and what laws are in force within them, - - -	63
1. District of Columbia, - - - -	69
2. Old Territory N. W. of the Ohio, - -	73
3. Old Territory S. W. of the Ohio, - -	74
4. Louisiana and Florida, - - - -	75
5. Forts, Arsenals, Dock Yards, &c. - - -	83
SECT. III. Question whether the common law is the national law of the United States, considered, -	85
Recapitulation of the principles attempted to be established in this dissertation, - - -	101
Hostility to the common law, its origin and cause, -	102
Inconveniences in the common law, but none sufficient to induce its abolition, - - -	104
Impossibility of abolishing the common law, - -	105
General view of the common law in England before the revolution of 1648, - - - -	106
Improvement of the common law since that time, in England, - - - -	111
In America, - - - - -	112
Defects of the common law, - - - -	117
The commercial and maritime law in England different in many respects from the general law of the commercial world, and why? - -	119
The improvement of the common law reserved to the United States; how to be effected? - -	123

CONTENTS.

XXXiii

	Page.
Effects produced in England by the writings of American jurists, - - -	124
The study of general jurisprudence recommended.	
Law should be treated as a philosophical science.	
Consequences that it will produce. Conclusion,	126

ADDENDA.

I. A brief sketch of the national jurisprudence exercised in the United States, from the first settlement of the Colonies to the time of the adoption of the federal Constitution. By Thomas Sergeant, Esq. -	133
II. An Address delivered at the opening of the Law Academy of Philadelphia, on the 21st February, 1821. By Peter S. Du Ponceau, LL.D. -	169

APPENDIX.

I. Constitution of the United States, - -	193
II. Extract from the Report of the case of the United States v. Worrall, (Circuit Court, Pennsylvania District,) - - -	213
III. Instruction from the Assembly of Virginia, to their Senators in Congress, respecting the common law, -	225
IV. Extract from the Report of the case of the United States v. Aaron Burr, (Circuit Court, Virginia District,) - - -	227
V. Report of the case of the United States v. Hudson & Goodwin, (Supreme Court U. S.) - -	233
VI. Judge Story's opinion in the case of the United States v. Coolidge, (Circuit Court, Massachusetts District,) - - -	237
VII. Report of the same case on appeal, in the Supreme Court of the United States, - -	247
VIII. Extract from the opinion of Chief Justice Tilghman, in the case of the Commonwealth of Pennsylvania v. Kosloff, - - -	249



TABLE OF THE CASES

CITED OR REFERRED TO IN THIS BOOK.

A.
African Company v Bull, 121
Angles v Underwriters, 15

B.
Bernardi v Motteaux, 14, 121
Bollman's Case, 72
Bree v Holbech, 118
Buller v Harrison, 123

C.
Calvin's Case, 66
Campbell v Hall, 66
Chandler v Lopus, 118
Clerke v Martin, 122
Commonwealth v Kosloff, 35,
36, 44, 249

v Sweers, 154

D.
Davis v Gilbert, 121
De Lovio v Boit, 137, 138,
158
Donaldson v Thompson, 124

F.
Fisher v Ogle, 124
Fualdes, case of, 116

G.
Gordon v Lowther, 141
E

H.
Hamilton v Mendez, 123
Havelock v Hancell, 121
Hughes v Cornelius, 14

J.
Jane v Paradyne, 119

L.
Lister v Graham's exrs. 118
Little Joe, 138
Lothian v Henderson, 121, 124
Luke v Lyde, 120

M.
Mannhardt v Soderstrom, 35
253
Marbury v Madison, 72, 251
Martins v Coles, 118

N.
*Nathans v Commonwealth
of Virginia*, 157

P.
Parkinson v Lea, 118
Penn's Case, 108
Penn v Lord Baltimore, 88
Penhallow v Doane's adms.
142, 145

TABLE OF THE CASES CITED.

Perrin *v* Blake, 114
 Pickering *v* Bush, 118
 Gov. Picton's Case, 65
 Pollard *v* Shaffer, 119

Q.

Col. Quarry's Case, 140

R.

Respublica *v* De Longchamps
 155
 Robinson *v* Raby, 109
 Rogers *v* Davis, 121
 Ross *v* Rittenhouse, 145

S.

The Sarah, 140
 Smart *v* Wolff, 62

T.

Talbot *v* Commanders, &c.
 of three brigs, 153
 Timrod *v* Shoolbred, 118
 Touteng *v* Hubbard, 119

U.

United States *v* Bevan, 61
 ——— *v* Bright, 145
 ——— *v* Burr, 5, 13
 37, 40, 227
 ——— *v* Coolidge, 9,
 13, 62, 92, 237
 247, 254
 ——— *v* Cornell, 84
 ——— *v* Gill, 61 /
 ——— *v* Henfield, 3
 ——— *v* Hudson and
 Goodwin, 7, 10
 11, 12, 13, 14,
 19, 47, 50, 56,
 233
 ——— *v* Peters, 145
 ——— *v* Ravara, 3, 35
 36, 252
 ——— *v* Williams, 93
 ——— *v* Wiltberger,
 61
 ——— *v* Worrall, 1,
 9, 13, 50, 213

W.

Whitfield *v* M'Leod, 118
 Wyoming cause, 153

A DISSERTATION
ON THE
NATURE AND EXTENT
OF
THE JURISDICTION
OF THE
COURTS OF THE UNITED STATES,
BEING A VALEDICTORY ADDRESS
DELIVERED TO THE STUDENTS OF THE LAW ACADEMY OF PHILADELPHIA, AT THE
CLOSE OF THE ACADEMICAL YEAR, ON THE 23D APRIL, 1894,
BY PETER S. DU PONCEAU, LL.D.
PROVOST OF THE ACADEMY.

EX LEGE COMMUNI NON ORITUR JURISDICTIO.
IN GENERALIBUS, GENERALE: IN LOCALIBUS, LOCALE JUS PRÆVALEAT.



A DISSERTATION, &c.

INTRODUCTION.

IN the year 1798, a bill of indictment was preferred and tried in the Circuit Court of the United States, for the Pennsylvania District, against one Worrall, for a fruitless attempt to bribe an officer of the federal government.* The fact being fully proved, a verdict was found against the defendant, when Mr. Dallas, one of his counsel, submitted a motion in arrest of judgment.

In order to understand the grounds on which this motion was made, it ought to be observed that the framers of the Constitution of the United States thought proper to vest in the judiciary, certain specific powers, extending even beyond the authority of the national legislature. They were empowered to decide all controversies "between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state, and between a state or the citizens thereof, and foreign states, citizens or subjects." These are all understood to be matters of merely civil jurisdiction.

* 2 Dall. 384.

Other specific powers were also granted, including cases of a criminal as well as civil nature. Those were to take cognisance of "all cases of admiralty and maritime jurisdiction and all cases affecting ambassadors, other public ministers and consuls." The constitution did not provide in like manner for cases affecting officers of the government of the United States.

In addition to the above branches of jurisdiction thus specifically granted, the judicial power was declared by a general clause to extend "to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or to be made under their authority."

Mr. Dallas contended that the offence of which the defendant stood convicted was not cognisable before this tribunal. It was not evidently within any of the specific powers granted to the judiciary of the United States, neither did it come within their general authority. It was not committed in violation of a treaty nor of a law of the United States, since Congress had passed no act applicable to this particular case. Nor could it be said to arise under the constitution; such a construction, if it were admitted, would lead to assumptions of power to which no bounds could be perceived. And were it even so, the common law, by which alone the act was made criminal, was not the law of the United States in their national capacity, and therefore, whatever it might be elsewhere, this offence was not here within the reach of justice.

Mr. Rawle, the attorney for the District in answer to Mr. Dallas's argument, insisted that the Court had a right to take cognisance of this offence, as of a case arising under the laws of the United States, because the officer whom the defendant had endeavoured to corrupt was appointed under an act of Congress, and that the Court being thus possessed of jurisdiction, the common law was to be looked to for the definition of the offence and the infliction of the punishment. In support of this last position, he cited the case of one Henfield,* who had been tried in the same court for a violation of the law of nations (a part of the common law,) and of the Genoese Consul Ravara, who had been convicted by the same tribunal of a mere common law offence.

* This was an indictment for enlisting on board of a French privateer and aiding in the capture of British vessels, in violation of the neutrality and of the treaties of the United States. The defence was, that neither the neutrality nor the treaties had been violated in this particular instance. The defendant was acquitted.

Judge Wilson, who presided at this trial, in his charge to the jury, took the ground of its being also an offence at *common law*, of which the law of nations was a part, and maintained the doctrine that the *common law* was to be looked to for the definition and punishment of the offence. This ground had not been adverted to in argument, or at least very slightly. But it would seem that the *common law*, considered as a municipal system had nothing to do with this case. The law of nations, being the common law of the civilised world, may be said, indeed, to be a part of the law of every civilised nation; but it stands on other and higher grounds than municipal customs, statutes, edicts or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilisation, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction is bound to administer it. It defines offences and affixes punishments, and acts every where *proprio vigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental

Thus, there appears to have been two distinct and independent questions involved in this case; the one whether the federal Courts had cognisance of the particular offence? the other, whether admitting that they had such jurisdiction, the common law could be looked to for the definition and punishment of the crime? The first of these questions, Judge Chase, who presided at this trial, did not think it necessary to consider, but decided in favour of the defendant on the broad ground that there was *no common law of the United States*. The question, he said, was not about the *power*, but about the *exercise* of the power. It was whether the Courts of the United States could punish a man for any act, before it was declared by a law of the United States to be criminal. The common law could not be resorted to for the definition and punishment of the offence. The United States *had no common law*, though the States had, but the common law of one State was not the common law of another; nor was the common law of England the law of any of the States, except so far as they had adopted and modified it by their statutes and usages, from which had resulted an endless variety which could not

principles. Whether there is or not a national common law in other respects, this *universal common law* can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state. Judge Wilson, therefore, in my opinion, rather weakened than strengthened the ground of the prosecution in placing the law of nations on the same footing with the municipal or local *common law*, and deriving its authority in a manner exclusively from the latter. It was considering the subject in its narrowest point of view.

On the trial of this cause, I was concerned for the defendant.

be reconciled. On this ground therefore (leaving jurisdiction out of the question) he was for arresting the judgment ; but the District Judge, Mr. Peters, differing from him in opinion, and the parties not agreeing to carry the case up to the Supreme Court, the judgment was not arrested, and the defendant was fined and imprisoned. Thus ended this celebrated case.

This decision of Judge Chase made a great noise at the time, and left vague but strong impressions, the more so as he was known to be a man of deep learning and considerable strength of mind and more disposed to extend than to limit power. Afterwards, in the year 1807, in the case of the *UNITED STATES v. AARON BURR*,* which was tried at Richmond in Virginia, Mr. Chief Justice Marshall, who presided at that trial in the federal Circuit Court on an incidental motion, in which this question was made, but which did not necessarily involve it, intimated an opinion that the laws of the several States, (including, of course, their common law) could not in any case be considered as rules of decision in trials for offences against the United States. This, however, he expressed upon the whole in the language of doubt, nor was his decision upon the point before him depending on this question. But the doubts of great men have often more influence than the settled opinions of men of inferior minds, which was the case in the present

* Report of Burr's Trial, by David Robertson, 2 vol. 8vo. Richmond, 1808. Vol. 2, p. 481.

instance. From the opinion of Judge Chase and the doubt of Mr. Chief Justice Marshall, an unsettled notion was formed and spread abroad among the profession, that "*the Courts of the United States had not jurisdiction of the common law.*" Such was the language in which the idea was expressed, in which no distinction was made between the common law as a source of jurisdiction, and as a rule or means for its exercise.*

It is not astonishing that this confusion of ideas should have prevailed. In England, the jurisdiction of almost every tribunal is derived from the common law, that is to say from ancient usage. From the same source proceeds, at the same time, almost the whole of the English jurisprudence. Jurisdiction and law flow together in a mixed stream, which in that country there is little necessity to analyse in order to separate its component parts; while in this country, a phenomenon has suddenly appeared, of a national judiciary in a manner assimilated to municipal tribunals by the various limitations of its powers, not as between the different Courts of which it might be composed, and with a view to settle their respective bounds of authority, but as between them and the tribunals of component parts of the nation, which, though dependent to a certain extent on the national government in all its

* I did not, any more than others, escape the general contagion. It was not until after repeated discussions of these questions in the law academy, that I began to perceive that the words "*common law jurisdiction,*" had no definite meaning, and was led to enter into this investigation of the subject.

branches, are still sovereign to all other purposes within their respective limits. The common law, therefore, is not the source to be resorted to to unravel the intricacies of this system.

Things remained in this situation until the year 1812, when a case was brought up to the Supreme Court from Connecticut on a division of the Judges, in which the question of *common law jurisdiction* was propounded in terms for the decision of the superior tribunal. It was the well known case of the UNITED STATES *v.* HUDSON and GOODWIN.* The defendant, a citizen of Connecticut, had been indicted for publishing a libel against the President and Congress of the United States. Whether the Circuit Courts had *common law jurisdiction* in cases of libel? was the question submitted to the Supreme Court, and on which it was called to decide.

The manner in which this question was worded seemed to imply that the Court in that case derived no jurisdiction either from the Constitution or a Statute of the United States. Could they assume such a power as derived only from the common law. The Court, through Mr. Justice Johnson, decided in the negative. They did not think it material to inquire whether the general government possessed the power of protecting themselves by providing for the punishment of such acts as this, nor to what extent they might possess it, but if they had this power, it did not follow that it was

* 7 Cranch, 32.

concurrently vested in the judiciary ; if the Constitution did convey certain implied powers to the government considered as a whole, it did not follow that the Courts of that government were vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. To this argument there seems to be no answer. It made at once an end of the case.

The Court, however, did not stop there, but proceeded to say that in order to vest jurisdiction in the federal judiciary in criminal cases, it was necessary that Congress should not only define the offence, but also affix the punishment. Of this I have taken the liberty to express doubts in the ensuing discourse. It is certain that Congress, in their penal statutes, have designated several offences merely by their technical names, without otherwise defining them. Nor do I conceive that these matters are at all connected with jurisdiction, which may be conferred by simple words, such as are sufficient to describe the person or the subject matter over which authority is given. But I will not anticipate my argument.

The Court proceeded further, and in doing so, I must say, travelled, as the phrase is, *extrà cancellos*, or beyond the record. The question submitted to them simply was, whether the Courts of the United States had common law jurisdiction *in cases of libel* ? The question which this case presents, said Mr. J. Johnson, " is whether the Circuit

“Court can exercise a common-law jurisdiction in *criminal cases*? We state it thus broadly,” continued the learned Judge, “because a decision in “a case of libel will apply to *every case*, in which “jurisdiction is not vested in those Courts by statute.”

As the Court understood it, there can be no doubt of the correctness of this opinion. They spoke of jurisdiction only, properly so called. It is clear that it can be conferred on the federal tribunals only by the Constitution or by the statutes made in pursuance of it, and that setting aside the question whether those Courts may derive their *rules of action* from the common or any other law, yet they cannot derive from such a source their *right to act*; except where, as in cases of admiralty, and maritime jurisdiction, a general authority is given to them to administer in all cases a particular body of laws. But these words, and those of Judge Chase in the case of the *United States v. Worrall*, were taken by the profession in a much more extensive sense than the Court in this case appears to have had in contemplation.

This was made manifest in a case which presented itself in the following year (1813) before the Circuit Court of the United States for the District of Massachusetts. I allude to the case of the *UNITED STATES v. COOLIDGE*.* This was an indictment for forcibly rescuing on the high seas, a prize which had been captured and taken possession of by two

* 1 Gallison, 488. 1 Wheaton, 415.

American vessels, and was on her way, under the direction of a prize master, to the port of Salem, for adjudication. Whatever else it might be, it was clearly not a case of common law. It belonged to the admiralty jurisdiction, expressly committed by the Constitution to the federal judiciary, and distributed between the Circuit and District Courts by the statutes of the United States, made in pursuance of it.

It appears that the case of the *United States v. Hudson and Goodwin*, before mentioned, had been decided by the Supreme Court on an *ex parte* argument, the counsel for the defendant having declined the discussion of the point. This, Mr. Justice Story, who presided at the trial of the case we are now speaking of, very properly considered as leaving the whole question still open, and as by no means settling the law upon it; but as the learned Judge was well aware of the difference between that case and the one before him, and that the jurisdiction of the Court could be sustained in the latter on much stronger grounds than in the former, it is much to be regretted that he thought it necessary to travel out of his straight path, and to abandon an impregnable fortress to seek battle in the open field. I can only account for his taking that course by the strong desire which I suppose he felt that the general question of *common law jurisdiction* should be considered by the supreme tribunal with the solemnity due to its importance, and that it should be finally settled after a full re-

hearing. For this purpose, it would seem, the two Judges divided, in order that it might be carried, (as in fact it was) up to the Supreme Court of the United States.

If this desire, which it seems was general among the profession, had not prevailed, it is probable that the difference between the case of the *United States v. Hudson and Goodwin* and the present one, would have been immediately perceived. The former was a case of libel of which no express cognisance is given by the Constitution to the federal Courts, while this was one of admiralty jurisdiction, committed exclusively to those tribunals in the most direct and explicit terms. The admiralty is governed by a peculiar law of its own, which may be called (as it is the fashion to call every thing) a part of the common law ; still it is not the common law in its usual and more restricted acceptation. Whether or not the offence charged was indictable under the admiralty law, is the simple question which appeared to result from the state of the case ; yet so much did ideas turn upon the *common law* and *common law jurisdiction*, that Mr. Gallison at the head of his report of this case, states the question to have been, *Whether the Circuit Court of the United States has jurisdiction over common law offences against the United States ?* It is highly probable that this was the point of view in which it was considered by the counsel who argued the cause. Their argument is not in print.

Judge Story, however, did not express himself

thus. "The simple question," said he "is whether the Circuit Court of the United States has jurisdiction to punish offences against the United States, which have not been previously defined, and a specific punishment affixed, by some statute of the United States." This was coming much nearer to the true point in controversy; but still, I shall, with due respect to the opinions of this learned and able Judge, endeavour to show, that it is stated in too general a manner, and that had it been confined to a Court sitting in the exercise of admiralty jurisdiction, it would have admitted of a more complete and more easy solution.

But it is evident, (to me at least) that Judge Story had the general question, which had so much and so long agitated the bar and the bench, always before his eyes.

This question the learned Judge decided in the affirmative. As applied to the case before him, there can be no doubt of the correctness of his decision, any more than of that of the Supreme Court of the United States, in the case of the *United States v. Hudson and Goodwin*, although they seem to be in direct opposition to each other. The reason is, in my opinion, that in both these cases, the Judges were led by the counsel into too wide a field of argument, and assumed as general principles, rules which, although correct, as applied to particular cases, were not so as applied to all. This is what I shall endeavour to demonstrate in the following address.

It is remarkable that the decisions of the Judges in each of the four above mentioned cases, although on general principles, they are apparently irreconcilable, yet are all perfectly correct as applied to each particular case. In the *United States v. Worrall*, Judge Chase, and in the *United States v. Hudson and Goodwin*, the Supreme Court were right in deciding that their respective tribunals had not jurisdiction of the particular case, while in the *United States v. Coolidge* Judge Story was also right in deciding the reverse. In like manner, in the case of the *United States v. Burr*, Mr. Chief Justice Marshall, decided with great propriety, in refusing to follow the course pointed out by the local law of Virginia. I shall not attempt to disturb any of these decisions.* The difficulty of the questions which I have undertaken to examine, will be found all to result from the *obiter dicta* of the Judges.

The case of the *United States v. Coolidge* was carried up by appeal to the Supreme Court. Richard Rush, Esq. then Attorney General of the United States, a gentleman whose talents do honour to his profession, being persuaded that the opinion of the majority of the Court was fixed on the general question, and that it would be in vain to attempt to discriminate between particular cases, gave up the cause without argument. The Court,

* I do not consider the reversal of the judgment in the *United States v. Coolidge*, as a deliberate decision of the Supreme Court, as it was not given upon a full view of the facts, and was submitted to by counsel without argument.

therefore, did no more than confirm their former decision in the case of the *United States v. Hudson and Goodwin*, under the belief that the one submitted arose from similar facts. Several of the Judges, however, expressed a wish to hear an argument whenever a proper opportunity should offer.

That the bar and the bench should take a legal question in too general a point of view, and fix their minds so steadily upon it, as to be unwilling to believe that it may admit of distinctions in particular cases, is a thing not at all to be wondered at, or to be interpreted to the disparagement of their learning or sagacity. Similar things have happened in every country. How came the English bar and bench, and even that truly great man, Lord Mansfield, in the case of *BERNARDI v. MOTTEUX*,* and in every subsequent case until very lately, to take it at once for granted, by an overstrained extension of the principle laid down by the Court, in the case of *HUGHES v. CORNELIUS*,† that the sentence of a foreign Court of admiralty, was conclusive against all the world, not only as to its effects, but as to every matter of fact which it professed to decide? By what strange hallucination did they persuade themselves that this doctrine was a settled principle of the law or comity of nations, while the opposite doctrine is laid down by all the foreign writers, who have

* Douglas, 554.

† 2. Shower, 232.



taken the subject into their consideration? * How came they not to perceive that the moral character of their nation, was implicated in a principle which permitted English underwriters to receive high war premiums for insuring neutral property against capture by belligerents, and its attendant confiscation, and to refuse paying the loss when it happened, on the ground that the property was not neutral, because it had been condemned? This is not said with a view to depreciate the talents or impeach the rectitude of the English Judges, but to show that the best and the greatest men will sometimes receive impressions, which are afterwards difficult to be eradicated. Besides, this is not written with a view to Europe, but to this country, where the doctrine of *conclusiveness of foreign sentences* has still too many friends.

The distribution of powers under the Constitution of the United States is so entirely new, and involves so many nice, and difficult questions of

* Regis et principis factum connumeratur inter casus fortuitos. *Roccus, de assec. not.* 65. Merces captæ à potestate, seu judice administrante in illo loco,—tenentur assecutores.—Quod judex facit injustè, dicitur casus fortuitus, and in assecuratione pertinet ad illum qui in se suscepit casum fortuitum. *Ibid.* not. 54. quotes *Straccha*, and numerous other authors.

Le fait du Prince est mis dans la classe des cas fortuits. *Scaccia, quest.* 1. No. 136. *Ibid.* No. 137. Peu importe que l'injustice procède de la corruption du Juge ou de son ignorance. *Quid refert sordibus judiciis, an stultitiæ res perierit, ff. de evictionib.* l. 51.—Il est donc certain que les assureurs répondent de la confiscation injuste prononcée par le tribunal du lieu où le navire pris a été conduit. *Emérigon, sur les Assurances*, Vol. 1. p. 457.

See also the opinion of this eminent jurist in the case of *Angles and others v. The Underwriters*, in Valin's Commentary on the Marine Ordinance of Louis XIV. vol. 2. p. 120. in conformity to which the Parliament of Aix gave their sentence on the 28th of June 1759, on the report of M. de Coriolis, *Valin. ibid.*

jurisdiction, that it may be considered as a fact highly honourable to our judiciary and to our country, that our venerable Judges, whenever the case has been fairly stated to them, have decided right on the main point of every such question that has yet arisen under it. That they should have committed occasional mistakes, on points which it was not incumbent upon them to decide, is no more than what others have done, whose reputation overspreads the world.

I have endeavoured in the following sheets, to discover the true principles upon which the cases turn, which have given rise to so many, and so various opinions. I dare not flatter myself with having succeeded ; but, at least, I shall have opened the way in which others, better qualified, may follow me with greater success.

The opinions of the Judges, in the four cases above mentioned, are inserted at large in the appendix.

THE ADDRESS.

MY FRIENDS AND FELLOW STUDENTS,

ON taking my affectionate leave of you at the close of this academical year, I have thought it my duty to address you on some of the most important subjects that have been discussed in the course of our exercises, I mean the nature and extent of the jurisdiction of the *Courts of the United States*, and the various laws by which they are governed. Twice, within these three years, you have debated the questions, whether the federal tribunals have jurisdiction or cognisance of crimes and offences at common law? and incidentally, whether there is a common national law in this country? These are weighty questions, which have called forth the exercise of the first abilities of the land, and yet at this moment are not completely settled. For, I do not consider them to be so by the decisions in the cases of the *United States v. Hudson and Goodwin*,* and the *United States v. Coolidge*.† I take no point to be settled by the first of these cases, but that the federal Courts can derive no jurisdiction from the common law, which doctrine has my full and unqualified assent; but it does not appear to me to follow that they cannot, in any case, take cognisance of offences at common law,

* 7 Cr. 32.

† 1 Wheat. 416.

nor that the common law is not in other respects than giving jurisdiction, the national law of these United States; the last case was given up by the counsel for the prosecution on a mistaken impression of the bearing and effect of the Court's decision in the first, and the Judges expressed a disposition to hear the question argued again whenever a proper opportunity should offer. I therefore consider the subjects which I have undertaken to treat of as still open to our modest and respectful inquiry.

Although I have bestowed upon these interesting questions much anxious meditation and assiduous study, I nevertheless approach them with the greatest diffidence. I am aware of all their difficulties, much more than those who have paid but a transient attention to them. But I will not be deterred either by the difficulty of the subject or by the consciousness of the inadequacy of my abilities. I have studied and reflected for you; to you I owe the result of my meditations and studies. Accept it, therefore, such as it is, from your friendly preceptor, who has no pretention but that of being useful to you, and seconding your noble ardour for the attainment of legal knowledge. I shall consider these questions in their order, and endeavour to convince you, by this investigation, of the importance of the science of general jurisprudence, or *LEX LEGUM*, as Lord Bacon elegantly calls it; as I hope you will find that by recurring to its principles, the most difficult questions may be solved, even

in a new and complicated system of constitutional law, which as it has not its equal in excellence, has not its like in the order and distribution of its powers.

The manner in which questions are stated is of the highest importance to their correct solution. In the first place, they should not be put in too general terms, for no one can foresee all the variety of cases that may arise, and in which perhaps, a different decision ought to be given. Thus, who can say, when he lays it down as a general rule, that the federal Courts cannot take cognisance of offences at common law, that there may not be cases where they must of necessity exercise that power? That there are such cases, I hope I shall be able to convince you in the course of this inquiry.

In the next place, questions ought not to be put in loose and vague terms, but in such as admit of a clear and definite answer. In the case of the *United States v. Hudson and Goodwin*, above cited, the question was as stated by the reporter, whether the federal tribunals could exercise *common law jurisdiction* in criminal cases? It appears to me to have been here ambiguously expressed, because the words *common law jurisdiction*, admit of different interpretations, and consequently of different answers. If it is meant by them to ask whether the Courts possess any jurisdiction derived from the common law, which seems to be the sense in which they were understood in that case by the Supreme Court, the answer is clearly to be

given in the negative ; because, the Courts of the United States, being the creatures of the Constitution, cannot have or exercise any powers but what they derive from or through it. Of this there can be no doubt. But, if this undeniable proposition is carried so far as to infer, that those Courts cannot in any case whatever, take cognisance of an offence which is only made such by the common law ; and this is the sense in which it seems to be generally taken by the profession, in consequence of some *obiter* expressions fallen from the bench ; then I am bound to say, that neither the Constitution nor the laws of the United States, nor yet the rules of sound logic, warrant such an application of the principle. Because the Courts have not jurisdiction *from* the common law, it does not follow that they have not jurisdiction *of* the common law. This is what I shall endeavour to prove to you in the present discourse.

The question which I shall consider is, whether an offence merely such at common law is indictable in the Courts of the United States ? In these terms it assumes body and shape, and is sufficiently clear and intelligible. It cannot, however, be answered in the same general terms. It admits of many distinctions produced by the complicated system of our judicial organisation. In certain cases it will require an affirmative, in others a negative answer. But I cannot make you understand this without a full development of the subject. I beg you will

have the patience to follow me in this investigation.

I shall, in the first place, explain to you the true meaning of the word *jurisdiction*, and the various subjects to which it may be applied. Then I shall endeavour to disentangle from it the question now before us, and examine it with you in its different aspects, and in the various points of view in which in my opinion it ought to be considered.

JURISDICTION, in its most general sense, is the power to make, declare, or apply the law; when confined to the judiciary department, it is what we denominate the *judicial power*. It is the right of administering justice through the laws, by the means which the laws have provided for that purpose. In its more limited sense, which is that in which we are now viewing it, it is still the judicial power; but considered in relation to its extent and to the subjects which it embraces or upon which it acts.

Every human jurisdiction, without exception, rests on one of three foundations, or on several of them together.

1st. The place or territory over which it is exercised, and that is called jurisdiction over the place, *in locum*.

2d. The persons which are subjected to its action, and that is jurisdiction over the person, *in personam*.

3d. The subjects of which it takes cognisance,

and that is jurisdiction over the subject matter, in *subjectam materiam*.

This last species of jurisdiction is sometimes limited by persons or places, by being restricted to cases in which certain persons are concerned, or to matters which arise or happen in certain localities. Thus the Constitution of the United States gives jurisdiction to the federal Courts of all suits between aliens and citizens, and between citizens of different states. This jurisdiction is general as respects the subjects of litigation; but is limited by the relative character of the litigant parties. It may therefore be considered as within the class of jurisdictional power over the subject matter, vesting only with respect to certain persons, *ratione personarum*. In like manner the Court of admiralty has cognisance of all things done on the high seas. This jurisdiction is also founded on the subject matter: it is not complete, however, until made so by the concurrent circumstance of locality; it is therefore *jurisdictio in materiam, ratione loci rei actæ*.

These are the only species of jurisdiction that exist, as I may say, *in rerum naturâ*,* none will be found on the strictest investigation to exist any

* It may be asked, perhaps, whether there is not also a jurisdiction *in rem*, as we are accustomed to speak in reference to the Court of admiralty. *Res*, is but another word for *materia*; therefore, jurisdiction *in rem*, means no more than jurisdiction over the *subject matter*. It matters not whether it be a physical or a moral subject. The words *in rem*, are more properly applicable to the process than to the jurisdiction. Thus, in respect to ships, we may say that the admiralty has jurisdiction over the subject matter, and, in general, exercises it by a proceeding *in rem*.

where that does not fall within some one or other of the above divisions of place, person, and subject matter, either general, or limited by each other. All the powers vested in the federal Judges by our national Constitution belong to some one or other of these species ; it would be wasting your time, and almost insulting your understanding, to attempt to demonstrate it. Permit me to say a few words on each of these branches separately.

1. Jurisdiction over the place, or *in locum*. This is the most common kind of jurisdiction, and is sufficiently defined by its descriptive name. Under our particular forms of government, the state Courts alone possess it within the districts allotted to them by their own local laws ; that of federal Courts is founded either on persons or subject matter, and although they exercise it within the state boundaries, yet it is not from the place that they derive their powers. It is otherwise in the forts, arsenals, and dock yards, in the District of Columbia, and in the territories belonging to the Union ; there the jurisdiction of the federal Courts is strictly *in locum*, and there it is exclusive of every other authority not created by the national body. The admiralty, in common with those of other maritime nations, has a concurrent jurisdiction over the high seas, which must not be confounded with that of things done at sea, which I have above mentioned. This last is analogous to that which was anciently possessed by the Court of the constable and marshal in England. It took cognisance of things done

in foreign countries, but had no jurisdiction whatever in or over the territory of the foreign country, or over its subjects.

2. *Jurisdiction in personam.* This species of jurisdiction is to be traced, in Europe, to the pride and ambition of the privileged orders. The ecclesiastics and nobles, disdaining to submit to the authority of the ordinary tribunals of their country, claimed the right of being amenable only to special Judges, generally taken from their own body. Hence the ecclesiastical Courts, the right of Peers in England to be tried only by the House of Lords, and other similar institutions, which are found in every European country. Inferior bodies successively claimed, and obtained similar privileges; hence corporate towns had their municipal Judges, and the two English Universities had an extensive judicial authority given to them, which they still possess over their members. "They have authority," says Blackstone, "to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold, and also all criminal offences or misdemeanors, under the degree of treason, felony, or mayhem."*

All these privileges are odious, except where they are confined to mere municipal police; because in every well regulated Commonwealth, every citizen ought to be amenable to the ordinary tribunals of his country. But it is otherwise with foreigners, and it is often a wise policy to establish a special

* 4 Com. 276.

jurisdiction to try their causes ; because the government is responsible for every injustice done to them. Thus, in the kingdom of Scotland, all foreign matters were formerly heard, and decided on by the King in council ; in later times a special jurisdiction has been vested for that purpose, in the Court of Session, who decide all such causes on general principles of equity.*

On the same principle, the framers of our Constitution have, with great wisdom, granted to foreigners the personal privilege of suing, and being sued in the federal Courts, and with no less propriety have extended it to American citizens of different States in their controversies with each other, by this means securing in a great degree harmony at home, and giving to foreign nations a solid pledge of the national justice. Many are of opinion that this important branch of jurisdiction has been too much narrowed down by the early adjudications of the federal Courts, feeling their ground, as it were, and fearful of overstepping the barrier of their chartered rights. Later decisions, however, evince a disposition to construe this jurisdiction in a less technical manner, and to consider this subject in a mere liberal, and national point of view. Indeed, it is difficult to reconcile with the feelings of the present times, a principle which should assimilate the Courts of the American Union to the inferior tribunals of the English monarchy. It is difficult

* Kaimes' Prin. of Eq. B. iii. c. 8.

also to reconcile with the rejection of the common law as a national system of jurisprudence, the searching into it with so much industrious care, for forced analogies to be applied to a state of things which it never contemplated, for rules which should rather be sought for in the spirit, and policy of our Constitution itself, and in the sound sense which dictated this admirable compact.

3. Jurisdiction in *subjectam materiam*. The subjects of this branch of jurisdiction are various as the law itself, since it embraces every thing which properly comes within the sphere of legislation. In general, they are crimes and punishments, natural and social relations, contracts, obligations, duties, rights and wrongs. In order to facilitate the administration of justice, the cognisance of these various matters is commonly distributed among different tribunals. Hence there are civil, criminal, ecclesiastical, military, maritime, commercial, matrimonial, and testamentary Courts, Courts of Equity, of revenue, and of international law. Some of these Courts take the civil, some the canon law, while others take the common or municipal law of the country as their general rule of decision; but it is not on the use of one or other of these codes that their right of jurisdiction rests. These are but the means or instruments, through which they exercise it, nor are they limited to the exclusive use of any one of them; for when proper cases present themselves, they expound, and decide on any system of jurisprudence, that may be found applicable. Thus,

our Courts of common law often apply the rules and principles of equity, while our Courts of Equity are even bound by the decisions of the common law. Thus all Courts of justice, when called upon to decide on foreign contracts, take the law of the foreign country, the *lex loci contractus* as their guide, and decide according to its principles. The jurisdiction over the particular case being vested in them, on one of the three grounds that I have above mentioned, they become entitled to use all the means and instruments that are necessary to its correct exercise, and among those, unless there should be a special prohibition or exclusion, are the laws which are applicable to the subject matter before them.

Let us not be deceived, therefore, by those familiar expressions which are used at the bar, and sometimes even on the bench, to describe and designate certain tribunals, but not to define their jurisdiction. Thus, the admiralty is called a Court of civil law, and the ecclesiastical tribunals Courts of canon law; but these denominations have nothing to do with the nature or extent of their jurisdictional rights, which are generally founded on the subject matter. The admiralty has cognisance of things done at sea, and of certain contracts and other matters of a maritime nature, such as bottomry, mariner's wages, salvage, &c. and of crimes, and offences committed on the high seas. As a Court of prize, it entertains jurisdiction of captures *jure belli* and their incidents, and in the United

States it is also a Court of revenue. The jurisdiction of the English ecclesiastical Courts comprehends various matters concerning the church establishment, such as substruction of tythes, oblations, mortuaries, and various other subjects relating to church discipline ; also the probate of wills, granting letters of administration, marriage contracts, consanguinity, divorces, alimony, &c. but the parliament might forbid them the use of either the civil or the canon law, and their jurisdiction would still remain the same, their means of exercising it would only be narrowed, or in some cases, perhaps, entirely taken away, but their right over the subject matter would not be in the least diminished. Thus, when the Legislature of Pennsylvania prohibited our State Courts from taking certain adjudications of the English tribunals as their rule of decision, they did not mean to abridge their jurisdiction in the smallest degree, but left it unimpaired as it was before.

It may be said, however, that the various branches of jurisdiction may be limited and restricted in such manner as the legislator thinks proper, and it will be inferred as necessary consequence that jurisdiction of crimes, and offences *ratione materiæ*, may be limited to certain criminal acts, while others may be excluded, and these designated by the particular code of laws which constitutes them crimes or offences. I admit both the proposition and the inference. But the question is not whether such a thing may be done, but whether it has been done ;

it is so different from the usual course of legislation that it ought not to be presumed, but the intention of the law giver should be clear and manifest, which I take not to be the case in the present instance. There is no such distinction made in any part of the Constitution of United States ; on the contrary, all the jurisdictions that it creates are founded on the natural, and legal grounds of person, place, and subject matter, without any, the least reference to any particular code, except that the common law is sometimes mentioned or referred to as the rule of decision in certain cases, but its exclusion is nowhere to be found. I undertake on the contrary to shew that such exclusion was never within the view of the framers of our Constitution, and that in those cases in which it has been laid down as a broad maxim, that the federal Courts have no jurisdiction of offences at common law, if the jurisdiction of those Courts was really deficient, it must have arisen from other causes, and the defect of jurisdiction must have been founded on other grounds than that which has been assumed.

In order to prove this position, I shall consider the Courts of the United States, in two different points of view :

I. As exercising their jurisdiction in or for the confederated States.

II. As exercising it for the territories belonging to the Union.

III. And in the third place, I shall incidentally consider whether there is a national common law in the United States.

The two above mentioned branches of jurisdiction are, in my opinion, extremely different. The one is unlimited, except by the acts of the federal legislature, where they apply, the other is restricted within precise limits by the Constitution itself: these limitations, it is evident, were expressly introduced for the purpose of guarding and protecting so much of the sovereignty of the States as they have thought proper to retain; but where the Constitution gives to the federal government an exclusive power over certain districts and territories, it could not mean to restrict their judiciary, where there was no sovereignty to protect but their own. In fact, the federal Courts when sitting in or for the United States, properly so called, are different tribunals from what they are when sitting in or for districts or territories, not within or under the separate jurisdiction of the State themselves. The Supreme Court, for instance, when sitting on an appeal or writ of error from Pennsylvania or Maryland, exercises its jurisdiction over one of the confederated States, and therefore is strictly to be considered as the Supreme Court of an union of independent Republics, limited and restricted by those branches of sovereignty which they have not parted with; when, on the contrary, it is sitting for the District of Columbia or the territory of Michigan, where there are no reserved rights that can be encroached upon, although still acting under the national authority, it is in those instances exercising the powers of the Supreme Court of the district or

territory, which powers, I humbly conceive the Constitution never meant to limit. This distinction I consider to be all important for the understanding of what is to follow.

I shall then in the first instance consider the jurisdiction of the federal Courts as it relates to the States properly so called, that is to say, as exercised within or for their proper territory.

SECTION I.—Within the actual limits of the States properly so called from which I except forts, arsenals, &c. over which the United States, by a special provision of the Constitution, have exclusive jurisdiction, the federal Courts cannot be said to possess jurisdiction *in locum*, unless by way of limitation of the extent of their judicial action. The general jurisdiction over the territory is in fact vested in the States themselves, by virtue of their sovereignty, and that of the federal Courts, derived from the Constitution alone, is merely permissive and consequential on certain specific powers. It is given to them, not as connected with, or flowing from, any right that they have over the territory, but as a means necessary to the exercise of their jurisdiction over persons and subject matter. It is, therefore, from persons and subject matter only, that their whole jurisdiction is derived within these precincts, and they possess no judicial authority whatever, unless it vests in them from one or the other of these two sources.

I shall, therefore, in the consideration of this part of my subject confine myself to the jurisdiction that is derived from either person or subject matter.

I shall endeavour to prove to you, that it is not true as a general principle, that the judiciary whether in criminal or civil cases, have not jurisdiction of the common law, or cannot take cognisance of common law offences ; that, on the contrary, whenever jurisdiction is completely vested in them from either of the sources above mentioned, they have cognisance of the law, whatever it may be, that is necessary to give effect to that jurisdiction, and they are not in all cases to wait until Congress have legislated upon the subject.

It must not be believed that our Constitution has given to the national legislature powers co-extensive with those that it has conferred upon the judiciary. There are many cases in which the judiciary can act, nay, when it must act, on subjects which the legislation of Congress cannot reach. Thus, in civil matters, the federal Courts have jurisdiction of all controversies between two or more states, between a state, plaintiff, and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects.* It cannot be pretended that Congress have the power to legislate on all the various subjects that may give rise to those controversies, although the judiciary are authorised to decide on all and every of them, whenever properly brought within their ju-

* Const. U. S. art. 3. §. 2.

risdiction. And it matters not whether the law which they dispense be the common law, or any other applicable to the subject.

In the same manner, the Constitution, by the same section, gives cognisance to the Judiciary of all cases affecting ambassadors, public ministers, and consuls, which is universally admitted to include criminal as well as civil jurisdiction. But it is clear that Congress have not the power given to them to legislate upon all matters that may affect those personages. Their legislative powers are confined within a circle traced by the Constitution itself, beyond which their authority ceases, while that of the Judiciary continues. Thus Congress may protect, by laws, the persons and property of ambassadors, public ministers, and consuls, and provide, as far as the law of nations permits, for their punishment, when guilty of certain offences ; but the States also may bind consuls by their municipal laws, criminal as well as civil, in all cases in which the law of nations, or treaties, do not exempt them from the effects of ordinary legislation ; and it cannot be imagined that the Constitution meant to give the power to Congress to interfere there, to make complete codes of civil and criminal law, and even police regulations, applicable only to that class of persons, and to release them from all subordination to the municipal laws of the States in which they reside. But the smallest as well as the greatest penalty incurred by a consul by the infringement of the municipal law of a State, is ex-

clusively cognisable in the federal Courts, and the State tribunals cannot exercise upon them even the least degree of jurisdiction.

If these principles are correct, it seems to me to follow as a natural consequence, that in all cases in which jurisdiction is vested in the federal Courts, either over the person or subject matter, those tribunals must either take the law applying to the particular case, whatever it may be, as their rule of decision, or the jurisdiction cannot be exercised.

Proceeding now to illustrate this doctrine by examples, I shall first consider its application to cases of jurisdiction *in personam*. The Constitution has given to the Supreme Court, but not exclusively, cognisance of all cases affecting ambassadors, other public ministers, and consuls; and an Act of Congress has conferred the same authority, as far as respects the latter of those public characters, on certain inferior Courts; here is then a complete jurisdiction given by reason of the person. If a consul commits an offence against the common or statute law of the State where he resides, how is that jurisdiction to be carried into effect, but by means of those laws which have been violated? How is it to be in a case in which Congress cannot possibly legislate within the State's territorial limits, as if a consul offends against the health laws, against an Act forbidding clandestine marriages, lotteries, unlawful games, the violation of days set apart for religious worship, &c. I see no answer to be given, but

that the federal tribunal is to stand precisely in the place of the State Judges, and to administer justice in the particular case, as these should have done, if the jurisdiction had not been taken from them, and vested elsewhere.* For the adjudicating power alone has been transferred from one tribunal to another, every other authority, as applying to the subject matter, remaining as it stood before, except where express or implied legislative powers are granted to Congress by the Constitution.

Three cases only have been decided (at least that have come to my knowledge) which bear upon this part of my argument. They are *Mannhardt v. Soderstrom*,† *The United States v. Ravara*,‡ and *The Commonwealth of Pennsylvania v. Kosloff*.§ The first was a civil action brought in the Supreme Court of Pennsylvania against the consul general of Sweden; after final judgment, the Court on a suggestion of the defendant's official situation, dismissed the proceedings, on the ground that they

* I am well aware of an objection that may be made, and which is entirely technical in its nature. It will be asked, whether the Courts of the United States have jurisdiction of *offences against the peace and dignity of the individual States*, and whether these can be said to be *against the peace and dignity of the United States*? But I see no difficulty in laying such an offence in an indictment, as *against the peace and dignity of both*; for it appears to me that in the political as in the physical body, *whoever offends a part, offends the whole*. But suppose this plain and obvious principle should not be deemed applicable to the case before us, the question then would be, whether this formidable objection is to prevent the execution of the powers exclusively vested by the Constitution in the federal Judiciary, and whether the Constitution is to bend to the technical forms of the common law, or these to be modified so as to suit the exigency of the case? I leave the answer to every sensible and rational jurist.

† 1 Binn. 138.

‡ 2 Dall. 97.

§ 5 Serg. & Rawle, 545.

had not jurisdiction. No doubt can be entertained of the correctness of this opinion, nor can it be supposed, if the suit had been brought before a federal Court, that it would have proceeded by any other rule than the common or statute law of Pennsylvania, as applicable to the particular case. The two others were of a criminal nature; but I can see no difference in the principle.

Ravara was consul of Genoa, and was indicted for writing sundry anonymous and threatening letters, with a view to extort money; Kosloff was consul of Russia, and his alleged offence was the heinous and horrible crime of rape. The former was an offence merely at common law, the latter was so likewise, but the punishment of it was affixed by the statute law of the State. One of these cases was brought before a federal tribunal, the other was not; but I see no reason, if both had been so tried, why the same course should not have been taken in the one that was in the other. Ravara was tried and convicted on the common law of the State of Pennsylvania; Kosloff might have been tried, convicted, and punished, according to my opinion, on the common and statute law combined, because they were the laws properly applicable to the case.

This appears to have been the sense of the national legislature, when they provided, in the 34th section of the Judiciary Act, "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise

require or provide, shall be regarded as the rules of decision in trials at common law, in the Courts of the United States, in cases where they apply." This statute goes the whole length of my argument, and I cannot consider it otherwise than as declaratory of what the law was before it was enacted.

It has been said, however, that this section of the Judiciary Act was only meant to be applied to civil, and not to criminal cases. But how has this been proved? In no way that I know of. The doctrine rests entirely on the *obiter dictum* of a single Judge, expressed in the modest language of doubt, in a case in which the decision of this point was not necessary to that of the question before him, I mean the case of *The United States v. Aaron Burr*, which will be presently adverted to, with all the respect due even to the doubts of the great character to whom I allude. In no other case do I find mention made of this construction of the statute, and there is no decision which bears directly upon it. This point, therefore, I think I have a right to consider as entirely open to investigation.

If we look attentively at this provision of the Judicial Act, we shall find abundant reason to believe that it was meant to include criminal as well as civil trials. For the section which it immediately follows, which is comparatively long, and goes very much into detail, is entirely devoted to subjects which concern criminal jurisdiction. This

is the last section but one in the Act; the last one treats variously of subjects of civil and criminal law, and these two concluding sections appear to have been made with a view to both, and not exclusively to either.*

* The following are the sections above referred to. They are in the Act of Congress of the 24th of September, 1789, commonly called the Judiciary Act:—

SECT. 33. *And be it further enacted*, That for any crime or offence against the United States, the offender may, by any justice or Judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested, and imprisoned, or bailed, as the case may be, for trial before such Court of the United States, as by this Act has cognisance of the offence: And copies of the process shall be returned as speedily as may be into the clerk's office of such Court, together with the recognisances of the witnesses for their appearance to testify in the case; which recognisances the magistrate, before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses, shall be in a district other than that in which the offence is to be tried, it shall be the duty of the Judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a Circuit Court, or by a justice of the Supreme Court, or a Judge of a District Court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. And if a person committed by a justice of the Supreme, or a Judge of a District Court, for an offence not punishable with death, shall afterwards procure bail, and there be no Judge of the United States in the district to take the same, it may be taken by any Judge of the Supreme or Superior Court of law of such State.

SECT. 34. *And be it further enacted*, That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply.

SECT. 35. *And be it further enacted*, That in all the Courts of the United States, the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law, as by the rules of the said Courts, respectively, shall be permitted to manage and conduct causes therein.

Those who contend that the Legislature did not mean to include criminal trials within this section of the Judiciary Act, should prove that Congress have not a right to designate the laws of the particular States as the rule of decision in criminal cases. This would be very difficult, if I have sufficiently shewn that the federal Courts, in the case of consuls at least, cannot exercise the exclusive jurisdiction given to them by the Constitution over this description of persons, without the aid of those laws.

It seems best, therefore, to adhere to the plain and obvious sense of the section before us, and to follow the trite but true maxim, *ubi lex non distinguit, ibi et nos non distinguere debemus*.

I now venture to approach with the greatest diffidence the high authority which is generally, but, I think, too hastily, considered as bearing against my doctrine—an authority to which I have long been

And there shall be appointed, in each district, a meet person learned in the law, to act as attorney for the United States in such district, who shall be sworn, or affirmed, to the faithful execution of his office, whose duty it shall be to prosecute, in such district, all delinquents, for crimes and offences cognisable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court, in the district in which that Court shall be holden. And he shall receive, as a compensation for his services, such fees as shall be taxed therefor in the respective Courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney general for the United States, who shall be sworn, or affirmed, to a faithful execution of his office ; whose duty it shall be to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall, by law, be provided.

accustomed to bow with profound reverence,—in short, no less a one than that of the Chief Justice of the United States. In the case of *The United States v. Aaron Burr*, tried at Richmond, before the Circuit Court, where the learned Judge presided, in the year 1807, he is reported to have advanced the proposition, in the broadest terms, that the laws of the several States could not be regarded as rules of decision in trials for offences against the United States.*

In order to understand the true bearing of this expression, it ought to be taken in connection with the case then before the Court. The defendant, Burr, had just been acquitted of a charge of high treason, by the verdict of a petty jury, but was still in Court, not having been formally discharged from his commitment. At the same time, another bill of indictment had been found against him for a high misdemeanour, which remained to be tried. A question arose about holding him to bail to take his trial, and about the mode of process which should be employed. The counsel for the prosecution contended that a *capias* was the proper mode, according to the modern usage of the common law, while their opponents insisted that a *summons* only could be ordered, according to the course of the law of Virginia. In support of this opinion they cited the 34th section of the statute above mentioned.

* 2 Robertson's Report of Burr's Trial, 432.

It would have been sufficient to have answered that the statute directed the State laws to be the rule of decision in cases only where they applied, that consequently they did not apply to the present case, which was an offence alleged to have been committed in violation of the national law, and that the State law, when it applied was only to be the rule on the trial of the cause, and not to prescribe the forms of incidental proceedings. But the counsel thought proper to go into a wide field of argument, and to contend that the statute only intended to make the State laws the rule in *civil cases*, and that it could not be so in *any case* of a *criminal* nature. The Court neither awarded a summons nor a *capias*, but very properly conceiving that the statute gave them power by a necessary implication to devise the proper process in such case, they simply made an order on the defendant to give bail or stand committed; thus deciding in the true spirit of the *American* common law, which abhors unnecessary forms, and is averse to putting an accused party to unnecessary expense.

In delivering his opinion, the Chief Justice expressed himself in the terms above mentioned, that the laws of the several States cannot be regarded as rules of decision in trials for offences *against the United States*; so far I think he was perfectly correct. Taking his last expression according to what I conceive to be its true meaning, I do not find that it militates at all against my opinion, which extends no farther than the words of the statute,

which makes the State laws the rule of decision only *in cases where they apply*. But those laws could not apply to an offence properly and solely against the United States, being a violation of the national Constitution and laws, and not of the local laws of any State. There, undoubtedly, the laws of the United States were exclusively to prevail, and that was a very different case from that of a consul violating the municipal laws of the place of his residence.

It is true that the learned Chief Justice, in giving his opinion on the same question, is also reported to have said "that *no man* can be condemned or prosecuted in the federal Courts on a State law." I think it is not treating a Judge fairly to bind him down to the unguarded generality of an expression which falls from him *obiter* in deciding suddenly on an incidental motion at the end of a long and tedious trial, and to which he is, perhaps, unnecessarily led by the devious course which counsel sometimes think proper to follow in their arguments. I will not do this injustice to the eminent magistrate whose opinion I have thus respectfully taken the liberty to advert to, I shall take these words in connexion with his opinion on the precise point before us, and observe, that he there does not speak in positive terms, but merely expresses a sudden thought then arising in his mind. His words are, "*it seems to me*" that this clause in the statute does not refer to criminal proceedings. It is evident that he did not mean to advance this position

as positive law, but as one that might be re-considered at a future day.

I have often wondered how jurists will sometimes wander to a great distance in search of principles which are close at their hand, and thus involve simple questions in imaginary difficulties. If it should be asked, for instance, without reference to any particular system of jurisprudence, what is to be the rule of decision in civil cases? it seems the simple answer would be, "the law which governs the contract or the civil right or wrong which is the subject of controversy." What is to be the rule on the trial of criminal causes? The law which is alleged to have been violated. And again, what rule is to be followed in forms of proceeding, and other incidental matters in either case? The answer is at hand: the law of the nation or government whose Judges administer justice in the particular case. What difficulty is there now in applying these principles to the federal Courts? None. The law of the United States, in perfect accordance with them, has made the State laws the rule of decision in the trial of causes in cases where they apply, and in no others; as to the forms of proceedings in civil cases, it has adopted those which are in use in the different States, under certain restrictions, and reserving to itself the power of alteration and amendment. In criminal cases, the rule is not so precise, but no inconvenience has resulted from the practice which has been followed, and may be now said to be established by usage.

Before I quit this part of our subject, I beg leave to refer you, gentlemen, to the able and luminous opinion of our venerable patron, Mr. Chief Justice Tilghman, in the case of *The Commonwealth v. Kosloff*. Although he only pronounced decisive judgment on the question immediately before him, I am much mistaken if, on the whole, his mind did not come precisely to the same conclusions which you have seen forced upon me. Permit me here to quote the concluding part of his argument, which confirms and illustrates the opinion with which I have been so far endeavouring to impress you.

“I am,” says he, “unable to deny that the “Courts of the United States can take cognisance” (of this case) “when I find it written in the Constitution that the Supreme Court shall have jurisdiction in all cases affecting a consul. But “how, or by what law is he to be punished? Shall “he be punished by the law of Pennsylvania, where “the offence was committed, inasmuch as there is “no other express law which reaches his case? “Does the 34th section of the Judiciary Act apply “to the *punishment* of offences?” (Here the learned Judge expresses a doubt merely about the *punishment*, not about the trial of the crime.) “May a “person convicted,” (again admitting the right to convict,) “of a crime of the highest grade, concerning which Congress has made no provision, “be punished, according to the opinion of Judge “Story, by fine and imprisonment, on the principles of the common law? Or is the Constitution

“to be so construed as to exclude the jurisdiction
 “of all inferior Courts, and yet suffer the autho-
 “rity of the Supreme Court to lie dormant, until
 “called into action by a law which shall form a
 “criminal code on the subject of consuls? These
 “are questions which may embarrass those who
 “have to answer them, but are not necessary to be
 “answered here. NO EMBARRASSMENT, HOWEVER,
 “COULD EQUAL THAT INTO WHICH THIS COURT
 “WOULD BE THROWN, SHOULD IT DETERMINE THAT
 “NO COURT OF THE UNITED STATES HAS JURIS-
 “DICTION IN A CASE WHICH AFFECTS A CONSUL
 “IN EVERY THING SHORT OF LIFE, WHEN THE
 “CONSTITUTION DECLARES, THAT THE SUPREME
 “COURT SHALL HAVE JURISDICTION IN ALL CASES
 “AFFECTING CONSULS.”

Having shewn, as I think, in a satisfactory man-
 ner, that where jurisdiction is given *in personam*,
 every thing else that is necessary to its due exer-
 cise necessarily follows, I hope it will not be dif-
 ficult to prove that the same principle applies where
 jurisdiction is given in *subjectam materiam*.

Suppose the federal Constitution had declared,
 in general terms, that the judiciary of the United
 States should have cognisance of all cases of *violence*
upon the persons of aliens; it is evident that this ju-
 risdiction could not have been exercised within the
 limits of the States, but by means of the law of the
 State where the crime was committed, unless Con-
 gress had at the same time power given to them to
 legislate upon those subjects, and then, until they

had so legislated, the State law would still have been the rule of decision.

The only difference in the present state of the matter is, that the jurisdiction of the federal Courts in criminal cases, is not every where so precisely described as in the above hypothesis, but is left in many cases to inference from an authority generally given. The whole jurisdiction of the federal judiciary in criminal matters is to be deduced directly or by inference from the generality of the powers given in the second section of the third article in the following words :

“The judicial power shall extend to all cases
“in law and equity arising under this Constitution,
“the laws of the United States and treaties made,
“or which shall be made, under their authority, to
“all cases affecting ambassadors, other public
“ministers and consuls, and to all cases of admir-
“alty and maritime jurisdiction.”

In this enumeration of powers, not a word is said of the common law, either by way of inclusion or of exclusion ; but frequent allusions and references are made to it in other parts of the Constitution and its amendments, which shew that the convention had this system in their contemplation, and it may be said constantly before their eyes. But this is not the place to touch upon this fact, and the inferences to which it leads, as it is to be adverted to in another part of this discourse ; it is enough for me at present to have shewn that the Constitution contains no exclusion of the common law, either as

a basis of jurisdiction, (if such it could be,) or as a rule or medium of judicial decision. From all that appears, the judiciary are not limited as to the use of any of the means that may be necessary to the exercise of the powers conferred upon them.*

One of the arguments that are used in favour of this exclusion in the United States, that the common law of England is foreign to us as an united nation, and that as it has been adopted in the different States, it has suffered so many variations, that no uniform system can be made out of the whole; this reasoning will be considered in its proper place; but the common law which I speak of at present under the head of offences committed and tried within the limits of the individual State, is the common law of the State where the offence was committed, and where it is tried, and why that, the only means (where no other law exists applying to the case) of administering justice and executing the powers granted by the Constitution, and, as I shall presently shew, by the laws of the Union, to the judiciary, should be interdicted to them, is what I never could conceive, and for which I have heard as yet no satisfactory reason given.

The reason given for this exclusion by Mr. Justice Johnson in delivering the opinion of the Supreme Court in the case of the *United States v. Hudson and Goodwin*, is, that this common law

* This is in conformity to the maxim of the civil law: Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potest. *ff. L. 2. tit. 1. l. 2.*

jurisdiction, as it is called, has not been conferred by any legislative act on the federal tribunals inferior to the Supreme Courts. He admits that the Supreme Court may exercise the judicial powers granted to them by the Constitution, (which, by the bye, except in a few specified instances, are appellate powers,) without the aid of a legislative sanction; but whether the Supreme Court themselves possess this common law jurisdiction, or whether it is in the power of the Legislature to confer this authority by a legislative act, he leaves undetermined as unnecessary to his argument.

But nothing appears to me more easy than to prove, that if this common law jurisdiction is among the powers granted by the Constitution of the federal judiciary, and if the Supreme Court of the United States can exercise it by virtue of that instrument; the inferior Courts have the same authority vested in them by an express act of the national Legislature, and this may be done by shewing that the powers given by the Legislature to the inferior Courts in criminal cases are couched in terms sufficiently general to embrace all those granted by the Constitution to the judiciary at large.

By the 11th section of the Judiciary Act of the 24th September, 1789, it is provided: "That the
 "Circuit Court shall have exclusive cognisance of
 "all crimes and offences cognisable under the au-
 "thority of the United States, except as this Act
 "otherwise provides, or the laws of the United
 "States shall otherwise direct, and concurrent ju-

“ jurisdiction with the District Courts of the crimes
 “ and offences cognisable therein.”

The exceptions to which the above section refers, are no others than certain powers which the act confers on the District Courts; taking the whole together, a jurisdiction is given and distributed between these two tribunals which is co-extensive with that which the Constitution has bestowed on the judiciary branch of the government; if, therefore, any particular jurisdiction is not vested in the inferior tribunals, it cannot arise from a defect of legislation with respect to them; but it must be either because the power in question is not included within any of the grants of judicial authority which the Constitution contains, or because, if included here, it cannot be called into action without an act of the Legislature, without any distinction between superior and inferior Courts.

These would be important objects of discussion, if the question stood on the point of *common law jurisdiction*; but as I conceive that the common law has nothing to do with it, it would only mislead us to pursue this argument further; having shewn that the common law is only a means of administering justice, which follows of course when the end is granted, I must now explain in what manner men of highly gifted minds have been led to consider the subject in this point of view; for which purpose it is my duty to point it out in its proper and precise shape; but this cannot be so easily done by general principles and arguments,

so various are the cases which this subject involves, I shall take the course of examining separately each particular case in which a decision has been given, and pointing out the different points of view in which each of them should, in my opinion, have been considered in order to arrive at the precise questions on which they severally depended. It will be seen that they do not all turn on the same principle, nor give rise to the same points of controversy. It must be remembered at the same time that I am at present only considering the extent of the jurisdiction of the federal Courts when sitting within the limits of or for the United States proper, and that other views will be presented when treating of their jurisdiction elsewhere. I shall consider in its proper place whether the common law, generally taken, is or not to be considered as our national system of jurisprudence; at present I speak only of the common law of the individual States.

I shall divide the cases to be examined under this head into two classes: 1st. Those of common law. 2d. Those of admiralty and maritime jurisdiction.

The most prominent cases under the first head are those of the *United States v. Worrall*,* and the *United States v. Hudson and Goodwin*.† They shall be considered together, as they are analogous, and appear to turn depend on the same principle.

* 2 Dall. 384.

† 7 Cranch, 32.

The first was the case of an attempt to bribe an officer of the government of the United States ; the second, that of a libel against the President and Congress. Both offences were committed within the limits of a State by private citizens thereof, and both stated in the reports as offences at the common law.

The first question to be examined in these cases, is, whether jurisdiction of any kind was vested in the Circuit Courts before whom these indictments were brought to be tried, on any of the three grounds which I have above mentioned.

Over the *place*, as I have shewn before, the right of jurisdiction could not vest without some one of the other two ingredients ; the States alone within whose limits the Courts sat having general jurisdiction within their territory. Over the *person* there was none, and as to the *subject matter*, it being a rape in the one case and a libel in the other, the Courts have clearly no jurisdiction in a general point of view. The only ground on which they could possibly claim it was, that the parties injured by the offences which were the subject of prosecution were officers of the government of the United States, in various stations. If this circumstance gave them jurisdiction, it was of that kind which I have called *jurisdictio in materiam ratione personarum*, or jurisdiction of the subject matter limited by the description of persons affected by the offence.

The first question, then, to have been considered

after it was duly settled that the common law could not give jurisdiction in such cases, was, whether the federal government had a right under the Constitution to protect their officers against personal outrages of any and what description; whether this power was vested in the judiciary as well as in the Legislature; and whether the former could exercise it without a specific law by virtue of the general judicial authority granted to them by the Constitution, and apportioned in its full extent by the federal Legislature among the different tribunals. The common law had nothing to do with these questions; for if the Constitution or the judicial acts founded upon it, either expressly or by some necessary implication, gave the Courts a general jurisdiction in criminal cases affecting officers of the government, as they have in cases affecting public ministers and consuls, I think I have clearly shewn that they could not carry that jurisdiction into effect without availing themselves of the common or statute law of the State where the offence was committed, as a means without which their end could not be accomplished. No such power appears to have been given, in explicit terms; if given at all, it is to be implied from that clause in the Constitution which enumerates, among other judicial powers, all cases arising under it and under the laws of the United States. Can it be said that because the officers of the federal administration are all appointed under this Constitution, or some of the laws made in pursuance of it, therefore all

cases in which they are concerned, or by which they are or may be affected, come under this general provision? This wide construction has often been attempted by counsel in argument, but it is evident that if it were adopted, the legislative power would be in a great degree transferred from Congress to the judiciary; for it would be sufficient to connect any act, in however distant a manner, with the Constitution or some of the laws of the United States, to vest an almost unlimited jurisdiction in the federal tribunals. There is no knowing how far this might lead, and therefore this construction cannot, in my opinion, be supported. This view of the subject is strengthened when we consider that the framers of the Constitution gave jurisdiction in terms to the judiciary of all cases affecting ambassadors, public ministers, and consuls, and might have done the same, if they had thought proper, of cases affecting officers of the general government, either generally or under limitations.

The next question is, whether protection may be afforded to those officers by the national Legislature?

This question is of the highest interest, and I may say of vital importance to the nation. That a government should exist which has not the power of protecting itself and its agents, while there is not a petty tribunal to which this power is denied, is such a solecism in politics, that it hardly seems to deserve a moment's attention. Yet we all know,

and history will tell what disturbance its exercise, not by an inferior Court, but by the federal Legislature themselves, occasioned in the nation. I allude to the act passed by Congress on the 14th of July, 1798, commonly called the *Sedition Act*. This law was brought forward in troublesome times and in the most obnoxious shape to public feelings, as it seemed to intrench on the people's darling prerogative, the freedom of the press. The consequences are well known. The people imbibed the opinion that this law had been made for the support, not of the government, but of a party, and the party and the law met with the same fate. Thus, by an imprudent and ill-timed measure, prejudices have been raised in the public mind against an exercise of power which every impartial man must admit to be indispensable to the safety, and perhaps to the very existence of the national government.*

But if, by a fair construction of the Constitution,

* In like manner, towards the close of the presidency of the venerable John Adams, but, unfortunately, after it was known that Mr. Jefferson was to succeed him, and that a different party from that which at that time had the government in their hands had acquired the ascendancy, a wise law was enacted for the new organisation of the federal judiciary. Circuit Judges were created for every State, and the Supreme Court remained stationary at the seat of government. If Mr. Adams had been placed under circumstances in which he could, regardless of momentary considerations, and looking forward to futurity, have left the Judges under this law to be appointed by his successor, he would have conferred a lasting benefit upon the nation. But having filled the seats at the moment when he was about to retire from office, the measure was ascribed to party motives, and one of the first acts of the succeeding Legislature was to repeal this excellent law, and the former order of things was restored. Since that time, every effort has been making to improve the judiciary organisation, but without success.


this power of self-protection is given to the federal government considered as a whole, and if it may be exercised by the legislative authority, can it by any construction, on the same general principle, be considered as contemporaneously vested in the judiciary authorities or in any of them? The Supreme Court of the United States cannot have it, unless it be by way of appeal. Its original exercise, therefore, if any where, must be lodged with the inferior Courts. Can these, by any implication from the powers granted to them by either the Constitution or the laws, assume to take cognisance of offences of this nature, from the murder of a President travelling through a State to the seat of government, to an assault and battery on a tide waiter? Are they to designate the particular officers who are thus placed under the protection of the nation through its legitimate authorities, to define their crimes and offences, and graduate their punishment? Has the common law provided for such a state of things, and was it ever within its view? I shall not undertake to decide these questions, because I do not think it necessary for my purpose; I place the subject upon another and a different ground.

Among the powers given by the Constitution to the national government, without distinction of its branches, some are imperative, while others are merely *potential* or *permissive*. Thus, although Congress have the power expressly granted to them of making uniform laws on the subject of bank-

ruptcy, they have only acted upon it temporarily, and ever since have abstained from its exercise. If this distinction is correct when applied to powers expressly given, it is so *à fortiori* as to those which are merely implied. The power of protecting the officers of government from violence and insult, is no where given in terms in the text of the Constitution, although it may be fairly inferred from its whole context. Nor is it given to any particular branch of the government. It is therefore, in the nation at large, and lies dormant until it shall be called into action by the national Legislature.

There is no absolute necessity for vesting immediately the judicial branch of this power in the federal Courts. The officers of the national government have long lived, and, it is to be hoped, will long live, under the safe protection of the laws of the States where they may permanently or transiently reside. When it will be necessary to give them a higher protection, it is not for the judiciary to decide ; the Legislature alone is appointed to watch over the welfare of the nation and provide for its wants : when it shall think proper so to do, it will be the duty of the federal tribunals to execute the laws that it shall make.

On this ground my mind perfectly coincides with the decision of the Supreme Court in the case of the *United States v. Hudson and Goodwin*, although I do not concur in all the reasoning which is reported as forming the grounds of their decision. The question was not propounded to them in such



clear and precise terms as to lead them directly to the essential point on which it turned. Yet this point did not escape their discriminating minds, and they have decided on it in such a manner as was to be expected from their judicial talents.

I shall now proceed to treat of cases which come within the scope of admiralty and maritime jurisdiction. It is necessary that I should speak somewhat at large upon this subject.

The admiralty jurisdiction in England is divided into two separate and distinct departments, proceeding by different laws and different forms of judicial inquiry. The original cognisance of civil matters is exclusively vested in the High Court of Admiralty, consisting of a single Judge, who is a Doctor of the civil law. All proceedings there are according to the forms prescribed by the Roman Imperial Code, which, together with the general maritime law and statutes of the realm, forms the rule of decision. The criminal jurisdiction, on the contrary, belongs to what is called the Court of Admiralty Sessions, which consists of commissioners of Oyer and Terminer appointed under the great seal, consisting of the Judge of the Court of Admiralty, who presides, and three or four other persons, two of whom are to be common-law Judges. In this Court all trials are by jury, and the proceedings according to the course of the common law. In ancient times, the Judge of Admiralty was possessed of criminal as well as civil jurisdiction in the fullest extent, but the civil law mode of trial

which was practised in his Court, in criminal as well as in civil cases, being justly complained of as a grievance, the present system was established by statute 28 H. 8, c. 15, which to this day continues in force.*

In the American colonies the whole admiralty power was vested in a single Judge, as it was formerly in England; in criminal causes, however, the trials were by jury, and the proceedings according to the forms of the common law. How this practice was introduced I cannot tell; probably in imitation of the usages of the mother country, possibly also the Judges were so directed in their commissions, or in the orders which they received from the Lords Commissioners. When the admiralty jurisdiction was transferred to the State Judges at the revolution, and subsequently to the federal tribunals, this mode of proceeding was so well established that it was, and is still, considered as inherent to the admiralty system, and as the law of the land in relation to this subject.

The result of this system is, that the criminal department of the admiralty jurisdiction in England and in this country, presents a singular mixture of the civil and common law, in which the latter, however, predominates. Although the statute of Henry VIII. introduced it merely for the purpose of regulating the mode of trial and form of proceedings, its principles have gradually become interwoven with the whole criminal branch of the

* 4 Blac. Com. 269.

admiralty law. To this the common law definition of the crime of piracy has not a little contributed. It defines this offence to be "those acts of robbery and depredation committed at sea, which, if committed on land, would have amounted to felony."* This reference to the common law for the definition and qualification of particular acts, threw the law of nations and the civil law so much into the background that it was even doubted whether piracy by the law of nations only, and not coming precisely with the common law definition of this offence was cognisable by an admiralty Court. In crimes amounting to felony, therefore, the common law may be considered, if not as the exclusive, at least, as a legitimate and concurrent source of authority and rule of decision; but in offences of an inferior grade, the law civil and maritime, as contradistinguished from the common or municipal law, still governs in every thing but the forms of proceedings and mode of trial.

Such is the jurisdiction which has been transferred by the people of the United States, and by the States, themselves, when they ratified the Constitution, to the national government, to be exercised by the judiciary branch of its administration. I do not and cannot consider it as one of those *potential* or permissive powers which I have above mentioned. It is of vital importance to the national safety and even existence, and it has been committed in its fullest extent to the federal judiciary, by name, while

* 4 Blac. Com. 71.

the power of the Legislature over the subject was left, except in the specific cases of piracy and prize, to be collected from implication and as matter of inference. If, therefore, the Congress had done no more than to designate the particular Courts which should exercise that jurisdiction, I do not think that they should be bound to wait for particular laws defining their powers or the mode of executing them before they proceeded to its exercise, neither should they wait for laws defining maritime offences and affixing their punishment; for the admiralty law has provided for all these matters, and the administration of that law was committed to them when the jurisdiction was transferred; for whoever gives the end gives the means. Nor do I think that so much inconvenience can arise as some have imagined from the defect of legislative provisions in these matters, even as respects criminal jurisdiction. Maritime offences are divisible into two classes, felonies and misdemeanors. The former, under the general name of piracy, are sufficiently defined by the law of nations and the common law. The latter are classed and defined in a well known scientific code, and their punishment generally results in fine and imprisonment as at common law. Doubtful and difficult cases, no doubt would have arisen, as in every other branch of the judicial functions; but it would have been the duty of the Judges to solve them as in other cases, subject to the revision of the Supreme Court of the Union. In matters of life and death, they would have taken care

not to convict, unless the law was clear, as well as the evidence. For, as Lord Bacon says, “De capitalibus in quibuscunque curiis nisi ex lege notâ & certâ pronunciato. Indixit enim mortem Deus ipse prius; postea inflixit. Nec vita eripienda nisi ei qui se in suam vitam peccare prius nosset.”* Thus in the cases of the *United States v. Gill*,† *United States v. Bevan*,‡ and *United States v. Wittberger*,§ where the law was not perfectly clear, and in some cases it even appeared that the Legislature of the United States had so restricted the locality of the crimes of which the parties were accused as not to include within their enactment the particular places in which they had been perpetrated, the Courts, with great propriety, either arrested the judgment after conviction or directed an acquittal.

I do not mean, therefore, to say that Congress have not a right to legislate on matters within the scope of admiralty and maritime jurisdiction. On the contrary, I think that they have a full and complete right so to do, and that when they have so done, their laws should be strictly and faithfully executed; but I think I am correct in asserting, that where they have not legislated, the Judges are nevertheless bound to execute the laws which apply to the subjects within their jurisdiction to the best of their judgment and understanding.

In cases of mere misdemeanour, I do not find

* De Jure univ. Aphor. 39.

† 3 Wheat. 336.

‡ 4 Dall. 426.

§ 5 Wheat. 76.

reason for the same scruples as in questions of life and death. Therefore, I regret that the celebrated case of the *United States v. Coolidge*,* should have been given up without argument. It does not appear to me, in the first place, that it turned at all upon the question of *common law jurisdiction*, or that this question was in the least involved in it. It was the case of a rescue on the high seas of a prize ship from the hands of the captor. It was, therefore, a clear case of admiralty and maritime jurisdiction, to be tried and punished, although by a common law mode of proceeding, according to the rules of the civil and maritime law. To say the least of it, it was a contempt of the authority of the prize Court; as it was intercepting property on its way to the Court that was to adjudicate upon it, and which was at that time to be considered as in *custodiâ legis*.† In either way, it appears to me it was punishable, whether the Court of Admiralty had jurisdiction or not of *common law offences*. If the case had been exhibited to the Court in this point of view, I think I do not go too far in believing that the jurisdiction of the admiralty would have been sustained.

Having thus gone through the observations I had to make on the subject of the jurisdiction of the federal Courts, when exercising it within or for the territory of the individual States, I shall now consider its nature and extent when exercised without that territory. The field is new and ample, and leads to novel and interesting views; I shall, how-

* 1 Wheat. 416.

† *Smart v. Wolff*, 3 Durnf. & East, 323.

ever, endeavour to condense what I have to say within those bounds beyond which I could not expect to receive your attention.

SECTION II.—The places without the jurisdictional boundaries of the confederated States over which the federal government has jurisdiction, are the following :

1st. The District of Columbia.

2d. The ceded Territories.

3d. The forts, arsenals, dock yards, &c.

All these dominions have been acquired by cession from the individual States or from foreign States, or purchased from individuals with the permission of the former. They are all subject to the exclusive jurisdiction of the national government. No judiciary power is exercised there but what is derived from federal authority.

We are, in the first place, to inquire whether there is in these territories, as well as in the States, a local law, which may be called the common law of the place, to be administered by the judiciary of the United States, and what that law is. We shall be guided in this inquiry by the law of nations and the common law of England, which profess the same doctrines upon this subject.

It will not be denied that the law of nations is a *common law* of the United States, or a law common to them in their federate and national character. It is with another law, which shall be mentioned in its place, the *nexus* which connects them toge-

ther in their sovereign capacities in all cases which the Constitution has not foreseen or provided for. In their relations with their subordinate, or, if the word may be properly used, *subject* dominions, the law of nations still governs in all matters in which their mutual or reciprocal rights are concerned, and other laws do not supersede it. Ceded countries, particularly, have been at all times under the special protection of the law of nations. Let us see what it provides with respect to them.

“A State,” says Montesquieu, “that has conquered another State, treats it in one of the four following manners: 1. It continues to govern it according to its laws, retaining only the administration of the civil and political government. 2. It gives it a new civil and political government. 3. It destroys the national society and disperses the people into other countries. 4. It exterminates all the citizens.”

“The first mode is conformable to the law of nations that we follow at this day.”*

I do not, nor did this distinguished author, mean to say, that the conquering sovereign may not and does not sometimes alter or modify the system of laws of the conquered country, and even abolish it altogether and substitute a new one if he thinks proper so to do. This is not unfrequently done, and often it is for the good of the subject. Thus Great Britain abolished in Canada the criminal law of France, and introduced in lieu of it the more

* Spirit of Laws, B. 10. c. 3.

humane code of the English law ; thus one of the first acts of Napoleon when he conquered Spain, was to abolish monachal institutions and the Holy Inquisition. But what I wish to shew is, that until the existing laws at the time of the conquest are thus abolished or altered, they remain in full force. We all remember the outcry that was not long since raised against a British governor of the island of Trinidad, for having inflicted the torture on a young woman accused of a capital crime. He pleaded the ancient law of the country, and was justified. Even at this day, notwithstanding the deadly hatred which the sovereigns of Europe maintained against the late Emperor of France, it is a fact that his civil and criminal codes are yet in force in the kingdom of the Netherlands and in the German provinces on the left bank of the Rhine ceded to Prussia; and the codes of Joseph and of Joachim are still the law of the kingdom of Naples. Near us, in Lower Canada, the *Coutume de Paris*, and the old French law generally, so far as it is not modified by British or local statutes, have never ceased, since the conquest, to be the law of the land.

But it may be said, that admitting these principles to be correct as relates to a conquered country, they may not be applicable to one that is transferred by a voluntary cession. This would be a distinction without a difference. In principle, the two cases are the same ; and it may even be said that a conqueror has more power over a country that he has subdued, than a sovereign who acquires

a territory by purchase or voluntary transfer. The uncontrolled rights of force are, in the first case, mitigated by a rule which the law of nations has established; a law founded on a principle of mutual convenience, which convenience is not less in the case of a cession than of a conquest. This principle, therefore, applies with greater force to the former than to the latter case. Besides, it is a well established maxim of the modern law of nations, that it is not the conquest of a country or the possession of it by force of arms that gives the conqueror a right to its quiet dominion, but the *cession* that is made of it to him by the treaty of peace. It is only the cession which makes the acquisition complete.* The military title which conquest gives is merged in the civil title obtained by this voluntary act, which alone gives to the conqueror a legal permanent dominion over the ceded country.

Hence the learned Blackstone, when laying down the common law on this subject, which is no other than the law of nations interwoven into that system, makes no difference between countries acquired by conquest and those obtained by voluntary cession. "In conquered or CEDED countries," says that able writer, "that have already laws of their own, the King may, indeed, alter and change those laws; but till he does actually change them, the ancient laws of the country remain."† I admit that the authorities he cites,‡ do not go the whole length of

* Vattel's Law of Nations, B. 3. c. 13. § 197.

† 1 Blac. Com. 108.

‡ They are, 7 Rep. 17, *Calvin's case*; Shower's Parl. Cases, 31, and Lord Mansfield's argument in *Campbell v. Hall*, Cowp. 204.

his position, as they only refer to countries acquired by *conquest* ; but of this he was, no doubt, aware, and nevertheless did not hesitate to lay down the principle in its fullest extent ; so that his opinion, though not supported by a direct adjudication at Westminster Hall, is nevertheless entitled to ~~the~~ the greatest respect as the deliberate and well considered sentiment of an enlightened common lawyer and general jurist.

It is, indeed, difficult to reconcile to reason the opposite principle. If the laws in force in a ceded country at the time of the cession do not continue to operate until others are substituted in their place, one of two things must happen ; either the laws of the new sovereign must immediately take effect, or there must be a period of anarchy or military despotism. The latter supposition cannot be for a moment entertained, and as to the former it will be asked whether the new laws are to be enforced from the moment of the cession, when the old sovereign has given up all his right, title, and jurisdiction over the country, or from the moment of possession delivered. If the cession avoids the laws of the ceding power, how is the country to be governed until the new sovereign comes into possession ? If the latter epoch is to be the period of change, how can the new subjects be expected to obey laws that they are not acquainted with, and how can they be justly punished for their infraction ? If a single day is allowed to give time for the promulgation of the new system, my whole prin-

ciple is granted. which is that the old laws remain in force until new ones are introduced by some public act of the sovereign in possession.

On this interesting subject, I have been astonished to find none but vague and unsettled opinions among the gentlemen of the profession whom I have consulted, who candidly acknowledged that they had never had occasion to reflect upon it. I searched the writers on the Law of Nations and on the Common Law, and, except the passages which I have above cited from Montesquieu and Blackstone, which, however, are no where contradicted, found nothing that I could consider as directly in point, though much from whence the principle may fairly be inferred. The Acts of Congress, on taking possession of the District of Columbia and the territories of Louisiana and Florida, did not afford me more satisfaction. I found there the same uncertainty and indecision, the Legislature sometimes providing for the continuation of the ancient laws, at others seeming to take it for granted that they remained in force without the necessity of a legislative sanction. In fact, if we except Blackstone, this subject does not appear to have been much considered in Europe or in this country.

There is not much reason to be astonished. This is not an every day question, and lawyers are not likely to meet it often in their practice. As to governments, while they can settle every thing with a stroke of the pen, they will not be inclined to lose their time in inquiring about abstract principles.

In the despotic kingdoms of Europe, these matters are very easily arranged ; but in this free and inquisitive country, where every man will not only know the law, but the reason of it, it cannot be expected that such an important subject should remain long undiscussed. I have therefore thought it my duty to bring it before you, and offer it as a subject for your earnest investigation. I believe I may venture to assert that you will not find the principle laid down by Blackstone any where contradicted, much less will you find another substituted in its place. It appears to me impossible to find one that will not be at once tyrannical and unjust.

I shall therefore proceed to its application to the subject before us, as respects the District of Columbia, and the other Territories under the dominion of the United States.

1. THE DISTRICT OF COLUMBIA. By the 17th paragraph of the 8th section of the 1st article of the Constitution of the United States, the Congress is authorised "to exercise exclusive legislation, in all cases whatsoever, over such District (not exceeding ten miles square) as may, by the cession of particular States, and the acceptance of Congress, become the seat of the government of the United States." The States of Maryland and Virginia, sometime after the adoption of the Constitution, offered to cede the Territory which is now the District of Columbia, and was then divided between their several jurisdictions. Congress by their act of the 16th July, 1790, accepted this offer, with a proviso

“that the operation of the State laws should not
 “be affected by their acceptance, until the time
 “fixed for the removal of the government thereto,
 “and until Congress should otherwise by law pro-
 “vide.” This proviso shews that at that time
 some doubt was entertained, as to the effect of the
 cession on the then existing laws, and it was prob-
 ably inserted as a matter of precaution to avoid
 unnecessary discussion.

In the year 1800, the seat of government was re-
 moved to Washington. On the 27th of February,
 in the following year Congress passed an act, di-
 recting “that the laws of the State of Virginia and
 “Maryland, as they then existed, should continue
 “in force within the parts of the District which had
 “been ceded by those States respectively.” This
 act seems to have been unnecessary, as the former
 statute had provided that those laws should remain
 in vigour until they should be altered. It may,
 however, be considered as corroborative, and as
 declaratory of the existing state of things.

Be that as it may, there can be no doubt, that
 whether in virtue of these acts of Congress, or of
 the general law existing at the time they were made,
 the common law of Maryland and that of Virginia as
 they respectively apply have never ceased to be in
 force within this District. Therefore, there can
 be no question *there*, whether the Courts of the
 United States do, or do not, possess what is called
common law jurisdiction, either in criminal or civil
 cases, and they have in fact been to this day in the

constant exercise of it, without the aid of a special statute for that purpose. The Congress did no more than erect and organise the tribunals inferior to the Supreme Court, and left them to exercise their jurisdiction according to the existing local laws. In the distribution of their powers, cognisance was given in general terms to the Circuit Court of "all crimes committed within the District," without any distinction made between statutory and common law offences. An appellate jurisdiction was given to the Supreme Court from all decrees, and judgments of the inferior tribunals, but there was no express prohibition against their exercising any other jurisdiction which the laws of Virginia and Maryland had before the cession vested in their Supreme Courts.

It is a question of no small importance, whether by the cession of this District to the United States, by Virginia and Maryland, and by the acts of Congress continuing in force the existing laws of those States, the Supreme Court of the United States did not *ipso facto* succeed to all the powers which were at the time vested in the Supreme Courts of Maryland and Virginia, within the parts of the District which had respectively belonged to them, and whether an act of Congress giving them certain specific powers, without any words of exclusion as to others, can be construed to the disparagement of those they possessed before. It may be questioned also whether the clauses in the Constitution which restrict the jurisdiction of the fede-

ral tribunals, were not solely intended to protect the retained sovereignty of the States from being encroached upon, and whether when those Courts are sitting in or for the District of Columbia or the Territories, where there is no independent sovereignty to be protected, the nature and extent of their jurisdiction may not be sometimes derived from another source? For my part, I acknowledge that I strongly incline to think, that the Supreme Court sitting at Washington possesses two distinct capacities, that of the Supreme Court of the United States, and that of the superior judicature of the District. I have always been astonished that this point was not made in the celebrated cases of *MARBURY v. MADISON*,* and *Ex parte BOLLMAN*,† in support of the authority of the Court to grant a writ of *mandamus* in the one case, and of *habeas corpus* in the other. But I will not proceed further on this delicate topic, which I acknowledge I have not yet sufficiently considered; all that I shall say is, that these questions never having been directly brought before the Supreme Court of the United States, cannot be said to have been finally decided on, and cases may yet arise in which much will depend on their being determined one way or the other. At any rate, this derivative power from the Constitution and laws of the States or nations who have ceded, or may hereafter cede, territories to the United States, if it really exists, is of too great importance to the supreme tri-

* 1 Cranch, 137.

† 4 Cranch, 175.

bunals of the Union, for them to yield it up without full and mature investigation. I consider it as one of the fairest flowers in their judicial wreath.

I beg your pardon for having thus somewhat wandered from the immediate object in contemplation ; but the subject of this digression does not appear to me to be entirely unconnected with it. It seems naturally to flow from the great and pregnant principle laid down by Montesquieu and by Blackstone.

I hope I have convinced you, that within this District the Courts of the United States have cognisance of the common law, in criminal as well as in civil matters. It is true, it may be said that they possess it by virtue of the acts of Congress above cited ; but I have endeavoured to prove to you, and I hope not without success, that they would have been entitled to that jurisdiction, even if those acts had never been passed, saving its distribution between the different tribunals, which could only be made by the authority which created and organised them. I proceed now to the Territories.

2. OLD TERRITORY NORTH WEST OF THE OHIO.—
Out of this extensive tract of country, three States have already been formed, to wit, *Ohio*, *Indiana*, and *Illinois*, who all, tacitly or otherwise, have adopted the common law, in aid of the statutes which have been enacted by the territorial authorities, and successively by their own Legislatures. It is needless to inquire into the state of things which produced that which now exists, as it would not lead us to any

practical result. The territory of Michigan, was before the revolution a part of the British province of Quebec, and governed by the French law in civil and the common law in criminal cases. Since it has become the property of the United States, the common law has been introduced into it, no matter by what means. The remainder of the old territory, except a few posts occupied by the troops of the United States, is in the possession of the Indians. The common law will probably make its way into it, as it has done into all the other parts, and indeed, it cannot be otherwise, as soon as it is inhabited by an American population. They will carry into it, as American citizens, as much of the common law as will be suited to their local situation.* But I must not anticipate on another part of my subject, to which I shall draw your attention presently.

Within those parts of this tract of country that have been erected into States, the powers of the federal judiciary are the same that they have been shewn to possess in the other States of the Union ; in the territory of Michigan, and in the territorial governments that may be established in the now desert country, the local law, whatever it may be, and the laws of the United States where they apply, will be their guide.

3. THE OLD TERRITORY SOUTH OF THE OHIO.—This tract of country, with some trifling additions, now forms the two States of Mississippi and Ala-

* 1 Blac. Com. 107.

bama ; they have both adopted the common law. The same principles will of course apply here which govern in the other States.

4. THE OLD SPANISH PROVINCES OF LOUISIANA AND THE FLORIDAS.—Before I proceed to the application of the principles which I have laid down to the States and Territories which have been formed out of this vast extent of country, it will not be improper to take notice of the course which Congress has pursued on obtaining possession of them. It will be found to be different from that which was adopted with respect to the District of Columbia, and will corroborate the observations which I have made respecting the necessity of a fixed principle in all such cases.

Louisiana was ceded by France to the United States in the year 1803, and was taken possession of at the end of the same year. On the 31st of October, Congress passed a law, authorising the President to take possession of and occupy that territory, in which it was provided, that until the expiration of the session, unless provision should be sooner made for the temporary government of the said Territories, all the military, civil, and judicial powers exercised by the officers of the existing government of the same should be vested in, and be exercised by, such persons and in such manner as the President should direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion.

By this act, Congress did no more than transfer to the President the powers vested in the national government by virtue of the treaty of cession, taking it for granted, of course, that the laws which existed at the time should remain in force until altered or repealed. Here note the difference between this and the special provision which was made for maintaining the laws of Virginia and Maryland within the District of Columbia.

On the 25th of February, 1804, another act was passed extending to Louisiana the United States law for registering ships, and entitling the inhabitants to the ownership of American vessels. This shews that Congress did not consider that the laws of the United States superseded those which were before established, either from the moment of the cession or from the time of possession taken.

On the 26th of March following, Congress, by another act, divided Louisiana into two territories, and legislating for one of them, (the territory of Orleans) extended to it several more statutes of the United States. The legislative power was given to the governor with the aid of a council, and they were authorised to alter, modify, or repeal the laws which might be then in force. An analogous power was conferred on the governor and judges of the northern section, which retained the name of Louisiana. No other material change was made in the existing laws of either district, but the introduction of the writ of *habeas corpus*, trial by jury in all criminal cases, and bail for offences not capital, and

trial by jury in civil cases at the option of either party. It was also provided that no cruel punishments should be inflicted. In every thing else, the territorial laws remained as they were before, without any special provision to that effect.

The same course was pursued with respect to Florida. By an act of Congress of the 3d of March, 1819, a discretionary power was given to the governor, in the same manner as had been done at first with respect to Louisiana, and certain specified laws of the United States were directed to be carried into execution within that territory. Not a word was said of the then existing system of laws, either to confirm or to repeal it.

This act, however, (except so much thereof as merely authorised the President to receive possession of the Floridas) was only to be in force until the end of the session of Congress of 1819—20, and as those Territories were only delivered up to the United States on the 10th and 17th of July, 1821, that part which provided for their temporary government could not be legally carried into execution at that period. How matters were then managed, it is not my business to inquire; but it is certain that if the laws of Spain did not then by the force of the law of nations, and the common law of these U. States continue in vigour, there must have been a long period of complete anarchy or of unauthorised despotism; for it was not until the 3d of March, 1823, near twenty months after possession of the country was delivered, that Congress passed an act for the establishment of a

territorial government within those Districts, which was entitled a "Supplement" to the one before recited, a part of which continued in force, but which was lapsed as to every thing which related to the government of the country. By this act the legislative power was vested in a governor and council; but the ancient laws were neither repealed, nor expressly maintained. This subject was passed entirely *sub silentio*.

These variations in the laws of Congress for the government of the different territories which have been successively acquired by the United States, can only be accounted for by the supposed absence of a principle applying to the subject matter, or the little attention that has been paid to it by statesmen as well as lawyers. I shall be happy if I have succeeded in proving to you that there is a fixed rule, not only consistent with the sound principles of natural justice, and of common sense, but recognised at the same time by the law of nations, and by the common law.

Suppose a murder had been committed in Florida within those twenty months of absence of all regular legislation; if the ancient laws of the territory had not remained in force until new ones were substituted in their stead, how could justice have been done against the criminal, and the tranquillity of the country preserved? Some persons, perhaps, will speak of Courts martial, and military government; but it is not to be thus governed, that subjects are transferred with territory from one

civilised nation to another ; rather than have recourse to such means, it is better to establish almost any principle that will continue to the inhabitants of the ceded country the enjoyment of a regular system of laws, and not leave them even for the shortest period at the mercy of an arbitrary ruler. But the law has provided one at once wise and salutary ; I hope I have not attempted in vain to demonstrate it.

On this principle, therefore, Louisiana and the Floridas were, at and after the times of their respective cessions, and possession thereof taken by the United States, under the dominion of the laws of Spain. Since those periods, this state of things has experienced considerable change. Out of old Louisiana, two great and important States have already arisen, one of which has resumed the ancient name of the Spanish province, and the other is now the State of *Missouri*. She was admitted into the Union on the 10th of August, 1821. During the first ten years of its territorial existence, that country was nominally subject to the Spanish law ; but as there were few or no lawyers among them who understood that system of jurisprudence, the common law gradually and almost insensibly superseded it, and at last, by an act of the territorial Legislature, passed on the 19th of January, 1816, it was proclaimed and established, and since has continued to be the law of the land. Louisiana pursued a different course.

That country was principally inhabited by people of French origin, and among them were several lawyers of great eminence, attached, as is natural, to the system of laws which had been the object of their early studies, and as naturally averse to one which they did not understand. Among the American jurists who directed their steps to that newly acquired dominion were also men of distinguished talents, among whom I need only name Mr. EDWARD LIVINGSTON, whose genius and learning have acquired so much fame to himself and to his country. He perceived with a keen glance what advantage could be taken of the existing state of things; he and his American colleagues were devoid of prejudice, and found the same liberal disposition in the French members of the bar of New Orleans. This harmony produced a system of jurisprudence combining the excellencies of the common and the civil law. This is not the place to explain its details; I shall only say, that all the practitioners that I have conversed with, common lawyers as well as civilians, who have exercised the legal profession within that State, concur in extolling it as the best that they have ever known. I have not heard on this subject one dissenting voice. The Americans from the old States who reside in that country, are also universally satisfied with it.

The Louisianians reject the common law as a system; they have even guarded by a special clause in their constitution against its introduction among

them.* But they do not reject its salutary principles when they find them applicable to their local situation and circumstances. They are as much attached as we are to those great bulwarks of political and civil liberty, the *habeas corpus*, the freedom of the press, trial by jury in civil as well as in criminal cases, and all those protecting forms which are established among us as the safeguards of liberty and innocence.

The Louisianians have lately determined to be governed entirely by written laws. Mr. Livingston has been charged with the preparation of a draft of a criminal code ; his able report to the Legislature upon that subject is well known in this country. He, in common with others, is also appointed to prepare a revised civil code, and thus every branch of State jurisprudence is to be reduced to a text. But do what they will, legislators will never be able to provide for every possible case, and much will still have to be left to the sound discretion of the constitutional expositors of the laws. The celebrated code of Justinian is not free from obscure laws, on the true sense of which commentators have not yet agreed, and even antinomies not unfrequently occur in the decisions and edicts which compose the body of the civil law. In

* " The existing laws in this territory, when this Constitution goes into effect, shall continue to be in force until altered or abolished by the Legislature: Provided, however, that the Legislature shall never adopt any system or code of laws by general reference to the said system or code ; but in all cases shall specify the several provisions of the laws it may enact." *Const. of Louisiana*, art. 4. §. 11.

every country there is what the French call *jurisprudence*, and we, *common law*; which is nothing else than the aggregate of the successive decisions of Judges on points which the textual laws have not foreseen, or have not sufficiently explained.*

But enough of Louisiana. The remainder of its ancient territory, not long since a wilderness, forms at present the territory of Arkansas, separated from Missouri in 1819, three years after the common law had been introduced by statute into that State. It therefore remains subject to it.

The Floridas are yet nominally under the dominion of the law of Spain, unless their lately established territorial governments have established the common law by statutes as was done in Missouri. At any rate the common law, if it does not already, must soon prevail in these Territories. It is a sound, and a wise policy where there is not a large and important population attached to another

* In France, although it abounds with codes, there are, nevertheless, voluminous collections of reports of judicial decisions, the knowledge of which is an important branch of the legal science, and is called *la jurisprudence des arrêts*. These decisions, although they are not considered paramount to the textual law, have nevertheless great authority. Before the late revolution, they were not so much respected as they are at present, because there was no supreme judiciary in that country, and the parliaments, within their several districts, often decided in contradiction to each other. The maxim at the bar then was, *judicial decisions are good for those in whose favour they were given*. But since a high Court for the correction of errors has been erected for the whole kingdom, under the name of *cour de cassation*, their opinions, though sometimes contradictory, have obtained a much higher degree of respect, and a *common law* is gradually establishing itself by the side of the ancient and modern codes. The degree of authority to which these supreme decisions are entitled, has lately become an important question among the French jurists. See on this subject the excellent treatise of M. Dupin, one of the most eminent advocates of the Paris bar, entitled "*De la jurisprudence des arrêts*," Paris, 1822. He maintains the doctrine of the great Bacon.

system, to introduce that which is in use in the governing country.

By whatever law these countries may be governed, *that* is their common law, and whenever it applies, it is that which the federal Courts are bound to carry into execution. But in all cases in which the local laws are not susceptible of application, these States and territories are of course subject to the same law with the others, to the *common and statute law* of the whole country.

I proceed now to the last division of this part of my subject.

5. FORTS, ARSENALS, DOCK-YARDS, &c.—By the Constitution of the United States, art. 1. §. 8. parag. 17. “Congress have the right of exclusive legislation in all cases whatsoever, over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.” The States by their cessions have sometimes thought proper to limit this right of exclusive legislation, and even to retain the whole of the jurisdiction which they before possessed. Thus Pennsylvania, in the act of Assembly of the 15th of April, 1795, by which she cedes Mud island, and the fortifications thereon erected, to the United States, has inserted a proviso “that her jurisdiction over the island, in civil, and criminal cases, shall be the same as before the passing of that act.”* Other modifications

* 3 Bioren's L. Pennsylvania, 223.

have been required by other States, and agreed to by Congress. Whether individual States, when they cede particular spots to the United States for the important purposes of erecting forts, arsenals, and other bulwarks of national defence, have a *constitutional* right to reserve to themselves the exercise of the legislative and judicial power over those places, and thus be enabled to defeat the military operations of the general government, is a question which I shall not here inquire into ; I think it, with Mr. J. Story at least, *extremely doubtful* ;* but I can see no reason why the laws which were in force on those particular spots before they were ceded, should not continue to govern, until Congress shall think proper to alter them; to be executed, however, by the authorities of the United States, and by no others, otherwise, anarchy must prevail there, in all cases for which Congress have not legislated. Thus, there is no provision made for the definition and punishment of the crime of *arson*, of all others the most dangerous in places of this description ; on the principles which I have laid down, this crime may be punished by the United States judiciary merely applying and executing the law on this subject, by which the place was governed before the cession.

Having thus explained to you the meaning of the word jurisdiction, and pointed out the various sources from whence the judicial authority in general arises ; having moreover endeavoured to

* U. S. v. Cornell, 2 Mason, 66.

elucidate the principles on which I conceive that every question respecting the jurisdictional rights of the federal Courts ought to be discussed, so as to lead to rational as well as legal conclusions, I shall proceed to consider another not less important subject by examining with you, whether there is in the United States a common or national system of laws, other than the law of nations, the Constitution, and the acts of the federal Legislature.

SECTION III.—If, as I have endeavoured to prove to you, there is in every State and in every District or Territory, a common or local law which takes effect in most cases in which Congress have not legislated or have not the power to legislate to the contrary, this question will probably appear to you more curious in theory than useful in practice; it is certain that if the principles which I have successively laid down are admitted, the circle of operation of this common or national law (if it exists) will have been very much narrowed, and but very few cases will remain susceptible of its direct application; nevertheless, the subject is too interesting to pass unnoticed, and, at the risk of trespassing too much upon your patience, I will proceed in its investigation.

I never could comprehend how a great country like the United States, connected by manners, customs, habits, religion, and government, can exist together without a *common law*. The civil law is the common law of Europe, and is so called, *jus com-*

mune. Each separate government has modified it as it thought proper to suit its own local circumstances, or has introduced into its territories new edicts, new laws, and new codes, but still the civil law governs in all their common concerns. It is, with the local ordinances where they apply, the rule of decision in their maritime Courts. In the negotiations between sovereigns, the principles of the civil law are constantly referred to, and their authority never denied. It is, indeed, the foundation on which the modern law of nations has been erected.

Before the late French revolution there was a tribunal at Rome, in many respects analogous to our federal Courts. It was called the *Rota*. Its Judges were appointed by the different Catholic sovereigns of Europe out of the number of their own subjects, and it took cognisance of all controversies submitted to them from every country. Its members were renowned for their integrity and learning, and many causes of the greatest importance, even between princes, were brought before them. Their judgments were every where respected. They did not take as the rule of their decisions the local laws and edicts of the papal States, but the common law of Europe, the civil law was their guide. I have understood that this celebrated tribunal has been lately re-established.

In the same manner, and on stronger grounds, I consider the common law of England as the *jus commune* of the United States.

Until the late revolution, the British colonies, although separated by local governments, have never ceased to make one whole with the remainder of the British empire. They were a part of the English nation, bone of their bone and flesh of their flesh. They brought with them, as Blackstone says, into this new country, so much of the English common law as was suited to their colonial situation. They brought it as a birth-right, and even after the declaration of their independence, the greatest number of them, if not all, claimed it as such. In most of them, also, their right to colonise was expressly burthened with the obligation to submit to these laws ; in all of them, these laws were the foundation of their whole legislation, and were recurred to when their local statutes were silent. The New England colonies alone refused to receive this system as imposed upon them, though they followed it in practice of their own accord, and as their own colonial law. To all local purposes this was right ; beyond that, as they enjoyed in common with all the colonists the protection of the common law, they were bound to submit to its corresponding duties, and virtually did so. The common law was the common jurisprudence of England and her *English* colonies, under such modifications as their peculiar situation required. In all cases for which the local law had not provided, or to which it was not applicable, this national law was the rule of decision. As the civil law is now in Europe, it was not, indeed, paramount

to the local customs and statutes, but it was the fruitful source from which principles were drawn to aid in the solution of all the doubts and difficulties which arose from them, and the rule by which unforeseen cases were decided. It was a general system of jurisprudence, constantly hovering over the local legislation and filling up its interstices. It was ready to pour in at every opening that it could find. Like the sun under a cloud, it was overshadowed, not extinguished, by the local laws. It lost nothing of its force, its power, or its vigour. It burst in at the moment of the adoption of the Constitution of the United States, and filled up every space which the State laws ceased to occupy.

In all national matters the law of England has never ceased to be the rule of right and wrong. The famous controversy between William Penn and Lord Baltimore, was determined on its principles. In the colonial Courts of Vice-admiralty, which were national tribunals, it possessed a widely extended dominion. Whatever would have been felony at land, was piracy when committed on the high seas. What was to be so construed, the law of England alone could decide; otherwise the crime of piracy would have been as various as the colonial Legislatures chose to make it, and the Judges would have been constantly embarrassed as to what laws they were to apply. The common law, therefore, in these cases must have been their guide.

It would take up too much of your time if I were to multiply instances of this kind. Besides, I must leave something for your future research,

The British colonies, now independent States, have never ceased to be under a national superintending government. Before the revolution, it was that of the King and Parliament of Great Britain. Their powers as to this country were limited, and so are those of the government which now supplies their place. They were succeeded at the revolution by a Congress whose jurisdiction was at first recognised by the individual States, and was more firmly established afterwards by an express national compact which at last gave place to the present federal government. Under these various forms the limitations of the power of the superintending authority were not always the same, but this did not affect their general character of a national head. The old Congress had, as well as the king of Great Britain, the powers of war and peace, of coining money, of holding prize Courts, and others of the principal attributes of national sovereignty. The general system of laws by which these always separated, yet always united, colonies or States were governed have never been repealed, either expressly or by necessary implication. They have always continued to be in vigour as far as applicable to our varying situations.

I think, then, I can lay it down as a correct principle, that the common law of England, as it was at the time of the declaration of independence,

still continues to be the national law of this country, so far as it is applicable to our present state, and subject to the modifications that it has received here in the course of near half a century. The most important of those modifications result from the uniform principles established by the Constitution and laws of the United States, and the Constitutions of the different States; the local alterations which the States have thought proper to make for their own purposes are no part of it, still it is pervaded by the general spirit of the revolution, as it was in England after the accession of William and Mary, which is easy to perceive by comparing the judicial decisions of those times with those that took place in the reigns of the Stuarts. Our Judges, in more liberal and enlightened times, are placed precisely in the same situation as the English Judges were at that period.

I know that nothing is easier than to start curious questions and raise imaginary difficulties. But I will venture to say that none such will occur, more than usually takes place in the ordinary administration of the law. In civil cases, the common law is resorted to by general consent, and the Judges have not experienced more than common difficulties in the execution of their duty. In criminal matters, the laws of the United States have provided for the most important and frequent occurrences; and, after all, the sphere of action of this national common law, beyond the operation which it receives without opposition in daily prac-

tice is so narrow, and its application of so rare occurrence, that, as I have observed before, the present question is more one of curiosity than of practical use. The only real difficulties that it presented I hope I have satisfactorily removed.

But why need I go into such a wide argument to prove what I consider a self-evident principle? We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet it when we wake and when we lay down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that we speak, and we cannot learn another system of laws without learning at the same time another language. We cannot think of right or of wrong but through the medium of the ideas that we have derived from the common law.

We need but open the Constitution of the United States and the laws which have been made in pursuance of it, and we shall find the common law almost in every line. I shall not here trouble you with numerous quotations, but I will ask you what is the privilege of *habeas corpus*, which, by the 9th section of the 1st article of the Constitution, is not to be suspended but in certain cases, if the common law is not there to explain its meaning? What corruption of blood is that which is mentioned in the third section of the third article? What are the suits at *common law* mentioned in the 9th amendment, and what common law is that which is there referred to? What is meant by this expres-

sion in the 13th section of the Judiciary Act of the 24th September, 1789, that the Supreme Court may issue *writs of mandamus*, in cases warranted by the principles and usages of *law*, and in the 10th section of the same act, when it saves to suitors a *common law* remedy in certain admiralty cases where the *common law* is competent to give it? What law, indeed, but that which is so elegantly defined by Mr. C. J. Marshall, in his opinion above referred to. "I understand," says he, "by the law "mentioned in the statutes of the United States, "those general principles and those general usages "which are to be found not in the legislative acts "of any particular State, but in that generally recognised and long established law, which forms "the substratum of the laws of every State."* To this high authority may be added that of Judge Story, who, in the case of the *United States v. Coolidge*,† declared, that "the Constitution and laws "of the United States are predicated upon the "existence of the common law."

That there is a general common law in the United State for all national purposes and for all cases in which the local law is not the exclusive rule, and that that law is the common law of England, was the decided opinion of the late Chief Justice Ellsworth, and it is the more remarkable, as he was a citizen of the State of Connecticut, where the common law is only considered in force as far as it has been adopted by their own judicial decisions. He delivered this opinion in the case of the

* 2 Burr's Trial, 482.

† 1 Gallis, 483.

United States v. Isaac Williams, which was an indictment for accepting a French commission to cruize, and capturing a British vessel in violation of our neutrality, the defendant pleaded that he was at the time a French citizen by naturalisation, but the Court over-ruled the plea, and C. J. Ellsworth declared "that the common law of this country was the same as it was before the revolution, "that the defendant could not dissolve the compact "which bound him to the United States, without "the consent of the community." Therefore he was convicted and sentenced to fine and imprisonment.*

This was in respect of its application a most unfortunate decision, and may be compared in its effects to the sedition law. It wounded the feelings and opinions of the American people, by denying the right of *expatriation* and setting up the claim of *perpetual allegiance*. Thus a sound doctrine by being mixed with a doubtful, and at any rate an unpopular principle, made the nation afraid of the common law, which they thought turned their country into a prison, and prevented them from migrating whithersoever they pleased. It was not necessary to go so far to convict Williams of having violated the neutrality of the United States by means of a fraudulent naturalisation in a belligerent country.

The general doctrine, however, laid down by C. J. Ellsworth, that the common law is the general law of the land, has always appeared to me to be

* Sergeant's Const. Law, p. 263.

correct. I have never been able to understand the distinction which has been made between civil and criminal cases, nor why, when we constantly apply its principles in criminal as well as in civil trials, we should hesitate to admit its definitions of offences and distribution of punishments ; for, after all, it is in these two points alone that seems to consist the whole difficulty.* After much reflection on the

* Various circumstances have concurred after the revolution to create doubts in the public mind respecting the operation of the common law in this country as a national system, particularly in criminal cases. The bitter feeling of animosity against England which the revolutionary war produced was not amongst the least of these causes. The States might recognise their own common law, but to have been subject in any case to the law of the *enemy*, seemed in some manner like a dereliction of the principle of independence, while it was no more so than the recognition of the binding force of the civil law was in the European States, a token of submission to the sovereignty of the Roman Emperors, whose succession was still continued in Germany. In the year 1781, Congress fell under an embarrassment which I can only ascribe to this popular feeling, and it is curious to observe how they extricated themselves. By the articles of confederation they had the power given to them of "appointing Courts for the trial of piracies and felonies committed on the high seas," (*Art. of Confed.* art. 9.) No power of legislation was annexed to this, while in the case of captures *jure belli*, they were empowered, not only to establish a Court of Appeals to decide those causes in the last resort, but to establish rules for deciding what captures should be legal, and how the proceeds should be distributed, which leads me to infer that in the case of piracies and other felonies, it was meant to withhold from them the power of legislation. It seems, therefore, that all they had to do was to appoint the Courts for the trial of those crimes, and to leave their Judges to proceed according to the law of admiralty. But they thought it necessary to proceed further, by which it appears to me that they exceeded their authority. They defined the offences, by assimilating them on the principle of the statute of Henry VIII., to the same crimes committed at land, and prescribed a common law mode of trial, much in the words of the same statute. They also affixed the punishment, but here it is easy to perceive that they were under the guidance of no solid principle, and the course they pursued was such as, surely, would not be imitated at this day; they resolved that the punishment should be the same as if the offence had been committed at land, and that the criminal "should be utterly excluded the benefit of clergy, where the same was "taken away or not admitted for such like offence, committed within the body

subject, it appears to me that these doubts have their origin in the fear, lest it should lead the federal Courts to claim and exercise too extensive a jurisdiction in criminal cases, which I think I have sufficiently shewn cannot be the case, and perhaps also in some vague fears that are entertained of certain harsh punishments which our modern manners reprove, but which still stain the page of the common law ; as for instance the punishment of petty treason in men by drawing and quartering, and in women by burning. But the 10th amendment of our Constitution has sufficiently provided that "no cruel and unusual punishment shall be inflicted," which word "unusual" evidently refers to the United States, and the time when the Constitution was made, and therefore is not to be confounded with the same clause in the English bill of rights, which referring to another period and to another country, may have been differently construed. The *peine forte and dure*, and burning in the hand in cases of manslaughter are abolished, and milder substitutes provided by our national

"of a county or at land, *where the trial should be had.*" Resol. 5. April, 1781—7. *Jour. of Cong.* 65. Thus a pirate taken by a vessel of the United States, might if brought into New Hampshire, for instance, be hanged, and if in Georgia, only be burned in the hand. In a former part of this discourse I have explained at large the principles which I conceive alone to afford the grounds of a sound and consistent legislation upon this subject.

It would be curious to know how the colonial Judges of the Courts of Admiralty construed the statute of Henry VIII., which defines piracy to be that which, if committed at land, would be felony. Did they take in such cases the law of the mother country, or the local law, as their guide ? As there was no great, if any, difference at that time between the one and the other, it is most probable that they never thought at all upon the subject.

statutes ; corruption of blood, trial by battle, all other modes of trial, but trial by jury in criminal cases are also abolished ; in short the common law as modified by our Constitution, by our laws, manners and usages, is as wholesome and as harmless a system, in criminal as well as in civil cases, as any that can be devised.

As to offences not capital, cruel and unusual punishments being forbidden by our Constitution, there remains none but fine, imprisonment and, perhaps, whipping and the pillory. I hope I shall hear nothing of the ducking stool and other obsolete remains of the customs of barbarous ages. The pillory and whipping, I know, are out of use in most of the States, imprisonment at hard labour having been substituted in lieu of them. Yet Congress have thought proper to retain the latter punishment in their penal code, and we have seen it inflicted not long since in our city on an offender against the laws of the United States. It is in the power of the national Legislature to alter or amend the law in this respect, as they shall think proper; but until they do so, I see nothing inhuman in the moderate infliction of either of these penalties, nor any reason why we should reject the common law on their account.

It may be said, perhaps, that there is too much left to the discretion of the Judges as to the quantum, and even the nature of the punishment and sometimes also as to deciding what is or what is not an indictable act. As to the quantum of pun-

ishment, I know no system of laws in which some discretion at least is not left to the Court according to the greater or lesser magnitude of the offence. It is impossible to avoid this inconvenience by any legislation. The same thing may be said of the authority to choose between two or three mild punishments ; there may be cases in which imprisonment would be death to the party, and when a fine may be inflicted upon him with greater effect ; others when the reverse may be the case. With respect to the power of deciding in some doubtful cases, whether a certain act be indictable or not, if it is an evil, it is one to which our citizens are all subject within their respective States, and I do not see why any should be exempted from it, merely because they are not amenable to a State jurisdiction. If it were so, it would follow, that the federal Constitution has loosened in a strange manner the bands of society which existed at the time of its adoption, and that it proclaimed impunity to every crime which the State authorities could not reach, until by the gradual and slow process of legislation, Congress should provide for every case that might in future arise. Such is the inevitable consequence of the principle that the United States have no national common law, while the doctrine that I contend for is entirely harmless, particularly when it is considered that the common law does not give jurisdiction to the federal Courts, but is merely directory of its exercise. So that it appears to me that

the opponents of this principle, by not viewing the subject in all its bearings, have in fact been afraid of dangers which are not to be apprehended.

Thus a phantom has been raised which needs only to be looked fully in the face to vanish into empty air. The more this question is investigated on its true principles, the more I am satisfied that the inquiry will result in the conclusions that I have formed and which I commit to your future research.

Before I conclude, however, this part of my discourse, I must take notice of an argument which is not without plausibility, and which may possibly be urged against the doctrine which, in a former part of this discourse, I have been endeavouring to establish. By the second section of the third article of the Constitution it is provided, "that the judicial power shall extend to all cases in law and equity arising (*inter alia*) under the laws of the United States." Now it may be said, that if the common law is a law of the United States, it necessarily follows that the federal Courts are bound to take cognisance of all offences committed against it, whether or not Congress has made provision by statute for their trial and punishment.

To this objection, which I acknowledge is not entirely devoid of force, I venture to answer: That the section of the Constitution from which this provision is taken, is altogether restrictive, and was intended to confine the powers of the federal judiciary within certain fixed bounds, and therefore its language is to be taken in its natural restrictive

sense, and not as extending authority beyond the bounds prescribed by the instrument. It appears to me also that by the words "the laws of the United States," the framers of the Constitution only meant the statutes which should be enacted by the national Legislature; otherwise, if they had intended to include the common law, they would have expressed themselves otherwise, and no doubt have also specifically described those powers under the common law which they meant to confide to the judiciary, for the general expression *all cases arising under the common law* would have given them such a wide and undefined extent of jurisdiction as cannot be supposed to have been in contemplation. By the words *in law or equity*, however, they have clearly shewn that they did not mean to exclude the common law as a means of exercising such jurisdiction as Congress might think proper to commit to the Judges in pursuance of the Constitution; for the law which is there spoken of can be no other than the common law. It has been supposed that the word *law* was employed here in contradistinction to *equity*, and therefore was meant to be applicable only to civil cases. But if it were so, how could the judiciary take cognisance of offences created by national statutes, if the very clause which gives them jurisdiction in cases arising under the laws of the United States, restricts them by the technical construction of one of the terms which it employs to cases merely civil, even though arising under those statutes? According to this construction the clause would read

thus : " All *civil* cases arising under the Constitution and laws of the United States." But when the Constitution gave to Congress the power to define and punish treason, piracy, and a variety of other crimes, and to make laws, such as a bankrupt law, embracing criminal as well as civil matters, it cannot be well conceived that it should have meant to confine the judiciary to the execution of such parts of those laws only as were of a civil nature, to matters of law in strict contradistinction to matters of equity.

It appears to me clear, therefore, that while the Constitution did not mean to vest in the judiciary an unlimited power to take cognisance of offences at common law, it still recognised the common law as their guide in all cases, whether civil or criminal, in which they had jurisdiction given to them over the person or subject matter, either by its own provisions, or by the laws which should be enacted by Congress in pursuance to the authority vested in them. Thus, if Congress should make a law authorising the District or Circuit Courts to take cognisance of all prosecutions for bribery or attempts to bribe an officer of the United States, without defining the offence or affixing its punishment, the Judges in such cases should be bound to administer the common or any other law that applied to the subject.

It must not be forgotten, however, that the restrictions which are thus imposed by the Constitution on the federal judiciary, were only intended to guard against encroachments on the sovereignty of

the individual States, and therefore are solely applicable to cases in which that sovereignty may be affected ; otherwise, it appears clear to me that the limitations of the judiciary power must proceed from other sources.

On the whole, therefore, I think I may venture to assert—

1. That the common law is the law of the United States in their national capacity, and is recognised as such in many instances by the Constitution of the United States and the statutes made in pursuance of it.

2. That when the federal Courts are sitting in or for the States, they can, it is true, derive no jurisdiction from the common law, because the people of the United States, in framing their Constitution, have thought proper to restrict them within certain limits; but that whenever by the Constitution or the laws made in pursuance of it, jurisdiction is given to them either over the person or subject matter, they are bound to take the common law as their rule of decision whenever other laws, national or local, are not applicable.

3. But that the limitations of the judiciary power which are the safeguards of the sovereignty of the States, do not apply to the judiciary when sitting in or for the Districts or Territories which acknowledge no sovereignty but that of the nation, and that there the common law has its full force, and is to be the rule in all cases in which the laws of the United States or the local laws do not apply.

I am well aware that this doctrine of the nationality of the common law will meet with many opponents. There is a spirit of hostility abroad against this system which cannot escape the eye of the most superficial observer. It began in Virginia in the year 1799 or 1800, in consequence of an opposition to the alien and sedition acts; a committee of the legislative body made a report against those laws which was accepted by the house, in which it was broadly laid down that the common law is not the law of the United States. Not long afterwards, the flame caught in Pennsylvania, and it was for some time believed that the Legislature would abolish the common law altogether. Violent pamphlets were published to instigate them to that measure.* The whole, however, ended in a law for determining all suits by arbitration in the first instance, at the will of either party, and another prohibiting the reading and quoting in Courts of justice of British authorities of a date posterior to the revolution. Both these statutes, as you well know, are still in force.

It was not long before this inimical disposition towards the common law made its way into the State of Ohio. In the year 1819, a learned and elaborate work was published in that State†, in which it was

* This spirit was considerably checked by a well written pamphlet published at the time by Joseph Hopkinson, Esq. of this city, in which he demonstrated the absurdity of the project of abolishing the common law.

† Historical sketches of the principles and maxims of American Jurisprudence, in contrast with the doctrines of the English Common Law on the subject of crimes and punishments.—By John Milton Goodenow, 428 pp. 8vo. Steubenville, 1819.

endeavoured to prove not only that the common law was not the law of the United States, but that it had no authority in any of the States that had been formed out of the old north western territory. But few copies of his work have been printed; nevertheless as it is learnedly and elaborately written, it cannot but have had a considerable degree of influence.

In other States, attacks upon the common law, more or less direct, have appeared from time to time.*

* Among those some persons seem to consider the address lately delivered before the Historical Society of New York, by my excellent friend Mr. William Sampson. For my part, I rather believe that he meant to point the keen arrows of his wit against the superstition, not against the pure religion of the common law. Mr. Sampson is an *Iconoclastes* in jurisprudence; he has made pretty free with the Saxon and Norman idols, and may have displeased those who would wish to bring us back to the ancient worship of *Thor* and *Woden*. But every liberal common lawyer will applaud the sentiments which he expresses in the following eloquent passage, which I beg leave to quote at large from his address:

"Our law is justly dear to us, and why? because it is the law of a free people, and has freedom for its end, and under it we live both free and happy. When we go forth, it walks silent and unobtrusive by our side, covering us with its invisible shield from violence and wrong. Beneath our own roof, or by our own fireside, it makes our home our castle. All ages, sexes, and conditions, share its protecting influence. It shadows with its wing the infant's cradle, and with its arm upholds the tottering steps of age. Do the smiles of the babe give gladness to the mother's heart, her joy is perfect in the consciousness that no tyrants power dare to snatch it from her arms; that when she consigns it to repose, its innocent slumbers are guarded by a nation's strength, and that it sleeps more free from danger than kings amidst their armed myrmidons. And when life's close draws near, we feel the cheering certitude, that those we love and leave shall possess the goods that we possessed, and enjoy the same security in which we lived and died. But that we are indebted for this, to Saxon, Scandinavian, Gaul, Greek, or Trojan, is what unsophisticated reason will not endure. We owe it to the growth of knowledge, and to the struggles of virtuous patriots, many of whom have bled and died for it: we owe it to fortunate occasion and favouring providence." *Sampson's Disc.* p. 60.

Its faults (for it is not free from them) are laid hold of and exhibited in the most glaring light ; its ancient abuses, its uncertainty, the immense number of volumes in which its doctrines are to be sought for, its various and daily increasing modifications in the different States, the contradictory decisions which occur among so many independent tribunals, and above all the supposed danger to our institutions from its being still the law of a monarchical country, the opinions of whose Judges long habit has taught us to respect, which opinions are received from year to year, and admitted in our Courts of justice if not as rules, at least, as guides for their decisions ; these are the topics which are in general selected for the animadversions of those who hold the contrary opinion to mine, and there is enough of plausibility in them to make us presume that they are not without effect on the public mind.

That there are real and serious inconveniences in our actual system of jurisprudence, is what no candid man will deny ; but none of them is, nor are all of them sufficient to induce the abolition of the common law. Were it abolished, a still greater difficulty must arise, to fill up the immense chasm which would be produced by its absence. Not all the codes of all the Bentham would be capable of producing that effect.

The task of legislation is not so easy a one as some people seem to imagine. The immortal Bacon was

of opinion that neither lawyers nor philosophers were fit for it; the former because their notions were too narrow, the latter because theirs were too enlarged. He thought that this business could only be safely confided to statesmen, as being best acquainted with mankind.* For my part, I am inclined to think that a good legislator ought to possess the combined knowledge and talents of the lawyer, the philosopher, and the statesman. I need not say how few there are of those in any age or in any country.

But admitting that this country possesses superior legislative talents to any other, I assert, without the fear of contradiction, that it is impossible to abolish the common law. Make as many codes as you will, this second nature will still force itself upon you :

——— “ Expellas furcâ tamen usque recurret.”

In proof of this, I shall adduce a very recent and very striking instance. The emperor Napoleon gave to the French a new and uniform code of laws, which has been now in force about twenty years. It is admitted to be as complete as a work of this

* Qui de legibus scripserunt omnes, vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanarum, aut Pontificarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam è vineulis sermoeinantur. Certè cognitio ista ad viros civiles propriè spectat; qui optimè norunt, quid ferat societas humana, quid salus populi, quid sequitas naturalis, quid gentium mores, quid rerumpublicarum formæ diversæ; idèdque possint de legibus, ex principiis et præceptis, tam sequitatis naturalis, quam politice, decernere. *De augm. Scient.* l. 8. c. 3.

kind can be, and well suited to the nation for whom it was made. But I can assure you, that, as far as I have been able to observe, the digests and code of Justinian, the former laws and ordinances of the kingdom, and the immense collection of the works of the civilians and French jurists are not less quoted at present in the lawyers' pleadings than they formerly were, and so it would be with us if we were to abolish the common law. We should still recur to it for principles and illustrations, and it would rise triumphant above its own ruins, deriding and defying its impotent enemies.

The common law may be viewed under different aspects. Hence the variety of opinions that have been and are still maintained respecting it. There is an ancient and a modern, an English and an American common law, making in some respects a whole system, in some others distinct codes. Viewed altogether, it presents a rude and mis-shapen mass, *rudis indigestaque moles*. Like certain works of art, its separate parts must be dwelt upon for some time before its beauties or its defects can be justly appreciated. It is not to be wondered at, therefore, if it has warm enthusiasts and violent enemies. It would require a consummate artist to delineate it as it ought to be; as I do not possess the requisite talent, I shall content myself with a plain statement of my ideas upon the subject.

I admire and I venerate the common law; not,

indeed, the common law of the Saxons,* Danes, and Normans, nor yet that which prevailed in England during the reigns of the Plantagenets, the Tudors, and the first Stuarts, but that which took its rise at the time of the great English revolution in the middle of the 17th century, to which the second revolution in 1688 gave shape and figure, which was greatly improved in England in the reigns of William, Anne, and the two first Georges, but which, during that last period and since, has received its greatest improvement and perfection in this country, where it shines with greater lustre than has ever illumined the island of Great Britain. In former times, its present defects excepted, it bore no resemblance to what it is now.

If the common law had remained in England as it was in the reigns of Elizabeth and James, it would not have deserved the high encomiums that have been justly bestowed upon it, nor would it have been worth being claimed by Americans as their birth right. England, it is true, had a kind of representative government, but so had almost every other country in Europe. As England had

* I shall cite only two of the laws of Alfred, the greatest of the Saxon kings, to shew how far they are deserving of the eulogies that have been lavished upon his times, and what liberty and equality there was in England under his reign.

“ If a man have connection with the wife of one worth 120*s* he shall pay 120*s*.; if with the wife of one worth 600*s* he shall pay 100*s* ; and if with the wife of a yeoman, 40*s*. for the redemption of his head. This fine shall be levied on the chattels of the delinquent, and he shall not be sold for it.”—LL. Ælf. c. 10.

“ If any one shall strike his man or his maid servant, and he or she do not die the same day, but live two or three days, he shall not be equally guilty, because his slave is his money; but if he or she die the same day, then the guilt shall rest upon him.”—LL. Ælf. c. 17.

her parliament, other nations had their States, their Cortes, and their Diets, but all weighed down by the supreme authority of the sovereign, by virtue of the dispensing power, borrowed from the example of the emperors and popes, and strengthened by the famous maxim of the imperial law, *Quod principi placuit, legis habet vigorem*. The celebrated writ of *habeas corpus* was a part of the English code, but the civil law had also its title, *De liberis exhibendis*,* and neither of them was adequate to the protection of the subject against the attempts of arbitrary power. Even trial by jury was no safeguard to the innocent, when powerful men thirsted for his life; the history of those ages offers no example of those independent juries who distinguished themselves in later times by the noble stand which they made against tyranny and oppression. All the firmness and eloquence of William Penn would have availed him but little in former reigns, and, indeed, when we consider the power which the Courts had and exercised even at this time, we cannot withhold our astonishment from the result of this prosecution. The trial of William Penn is one of the brightest examples of successful virtue and courage which History affords.

The civil jurisprudence was a complex system in which the Judges lost themselves in refinements and distinctions without end. The method of reasoning by induction, which Bacon recommended and exemplified, and which the celebrated Stewart

* *ff. lib. 43. tit. 30. De liberis exhibendis, item ducendis.*

and the philosophers of the Scotch school have so elegantly elucidated, was then unknown, or not understood; the logic of the schools prevailed, and every thing was discussed by syllogisms in *Barbara* and *Baaliopton*. A highly complicated system of *litis contestatio*, or, as we call it, *pleading*,* overdriven to excess, excluded plain reason and common sense from the bar and from the bench, and a great majority of the cases brought before Courts of justice were decided upon some nice point of form. This artificial logic produced the same effects in England, which the

* The great Lord Mansfield has said, that "the *substantial* rules of pleading are founded in strong sense, and in the soundest and closest logic." This is undoubtedly true; but Lord Mansfield does not tell us what are those *substantial* rules, while at the same time he confesses that even those "by being *misunderstood* and misapplied, are often made use of as instruments of chicanery." *Robinson v. Riley*, 1 Burr. 319

In the same manner the *substantial* rules of the Aristotelian system of Dialectics are founded in strong sense, and in the soundest and closest logic. There is nothing better than syllogistic forms to bring a controversy to a point or to prove the fallacy of an argument. Yet we all know how these forms have been abused. In fact they are, as well as the English system of pleading, nice and delicate instruments, excellent in the hands of those who know how to use, and are not disposed to abuse them; but too dangerous to be entrusted to every one, when great inconveniences may arise from their unskilful or designed perversion.

While writing this note, I find in a late English newspaper an extract of a speech of the Lord Chancellor of England in the House of Peers, on the 6th of March last, which is so appropriate to my purpose, that I cannot help inserting it here: "He took the opportunity," he said "of observing upon the "intricacy of legal pleadings. In former times, these pleadings were extremely simple, but by modern practice, they had been rendered most complicated. It had been thought advisable to assimilate the pleadings of Scotland, "the length and intricacy of which had been much complained of, to those of "England; but it appeared to him that the pleadings of this country were now "nearly as intricate as those of Scotland, and therefore little would be gained "by this assimilation." The editor who reports this extract adds these emphatical words: "We rejoice most unfeignedly that the CHANCELLOR has enlisted "himself on the side of COMMON SENSE.—*Lond. Morn. Chron.* March 8, 1824.

Aristotelian Dialectics had produced in Greece and at Rome ; sophistry became in vogue, and Seneca, if he had lived in those times, might have applied to the English lawyers and Judges what he says of the Roman sophists in his eighty-second letter to Lucilius. The plain rules of right and wrong were lost sight of in the midst of a sea of metaphysical subtleties. The greatest talents were misapplied in endeavouring to find reason beyond the bounds of common sense. As theology had had her Thomas Aquinas, so jurisprudence had her Coke; both men of great mental powers, superior to most of their cotemporaries, but not to their age. One man alone arose, whom no country and no age ever surpassed, who held up the torch of truth to a generation whose eyes were too weak to bear its resplendence. This was the great BACON :

Qui genus humanum ingenio superavit & omnis
Præstinxit ; stellas exortus uti æthereus Sol.*

I invite you, my dear fellow students, to read with the utmost attention and to compare with the writings of the other jurists of those times, his admirable treatise “ *De justitiâ universali, seu de fontibus juris.*” It is at the end of the third chapter of the eighth book of his celebrated work “ *De dignitate & augmentis scientiarum.*” It is divided into ninety-seven aphorisms, every one of which ought to be studied and meditated on by every lawyer and statesman, and by every student who aspires to become either.

* Lucret.

If we wish to have an idea of what the civil jurisprudence of England was towards the end of the wars of the two Roses (and if we except the bankrupt system, the acts of Elizabeth against fraudulent conveyances, and perhaps, a few more statutes, it was not much improved from that time to the period of the revolution) we have only to turn to the book of Chancellor Fortescue *De laudibus legum Angliæ*, a work professedly written to prove the superiority of the law of England over all others, and particularly the civil law. Setting aside what he says of the representative form of government and of trial by jury, he adduces no instance of that superiority, but the illegitimacy of ante-nuptial children, the maxim, *quod partus non sequitur ventrem*, and the doctrine of feudal wardships, none of which would be considered at this day as giving an advantage to one system of law over another. Yet Chancellor Fortescue was a very learned man, and appears to have been equally skilled in the civil and in the common law.

The true æra of the common law is the period which followed the great revolution of 1648, to the time of our own emancipation. It was then that it assumed that bold and majestic shape, those commanding features which have made it the pride of the nations who possess it, and the envy of those that do not. During that period the rights of man have been acknowledged and defined, and limits have been set to the sovereign authority. The prerogatives of the crown (I am speaking here of

England) have been ascertained and restricted within proper bounds, the legislative, executive and judicial authorities have taken their respective stations and known the extent of their several powers ; Judges have been rendered independent, and juries have been freed from ignoble shackles. The writ of *habeas corpus* has been made effectual, a fair and unexceptionable mode of trial has been provided for cases of high treason. The press has been freed from the unhallowed touch of State licensers, religious toleration has been established. The hand of arbitrary power has been paralysed, and man has been taught to walk erect and to feel the dignity of his nature. Civil jurisprudence has also been considerably improved, and is in a progressive state of further amendment.

These are the great features of the English Common law, by which that country has been raised above the other nations of Europe. I am now to shew the improvements which have taken place in the United States.

I shall not speak here of the difference which exists between the forms of government of the two countries; such comparisons are invidious and entirely useless to my purpose. I do not want to raise our nation at the expense of another which in all probability, had she been placed in our situation, would have acted precisely as we have done, and it may well be doubted whether in her circumstances we should have done better than she has. Besides, it is the law alone, not the national organisation that I have in view : I need not say that

America has adopted all the improvements of the mother country, I shall only shew what ameliorations she has herself made in the system. Not only religious *toleration*, but religious *equality* has been established. Treason has been constitutionally defined, and by the same instrument, as well as by the Constitutions and laws of the several States, a right has been secured to every accused party to defend himself by counsel in all criminal cases, without discrimination of fact or law. The benefit of the writ of *habeas corpus* has not only been secured in the same manner as in England, but its remedy has been extended by the power which the Judges have and exercise of investigating the real merits of each case without confining themselves to the face of the return. The liberty of the press has been made to rest on a constitutional sanction, and not on the mere absence of prohibitory laws. Mild punishments have taken the place of the former sanguinary code, and the interior economy of prisons, and penitentiaries has been suited to the humanity of the age. Imprisonment for debt has been taken away in several of the States in favour of the weaker sex, there is even a general disposition to abolish it altogether : but if it should be abolished, it is to be hoped that a greater hold will be given to the creditor on the property of his debtor than he has by the existing laws ; that for instance, the doctrine of liens will be further extended, and outstanding debts made liable to attachment or execution, under suitable regulations. Nor will it be,

Q.

perhaps politic to abolish it as to every description of persons; but I should have too much to say if I were to proceed further on that important, but delicate and complicated subject. I shall only observe that it is closely connected with a system of bankrupt law.

Civil jurisprudence has also been greatly improved in the United States. Of the ancient feudal system nothing remains but a few empty names and forms, while in fact the citizens may almost be said to hold their property in pure *allodium*.^{*} All the lands sold by the State of New York have been granted allodially in name as well as in substance, although from the force of mere habit, the words "fee simple" are still used in the conveyances, from one purchaser to another. Estates tail are every where (except in one State) either abolished, or a simple form has been provided for con-

^{*} The case of *Perrin v. Blake*, (4 Burr. 2579, Butler's notes on Co. Lit. 329,) has been and I presume is still in England the source of endless discussions. It was decided one way by the Court of King's Bench, another by the Court of Exchequer Chamber, and the parties having compromised pending a writ of error to the House of Lords, it was not finally decided. At the time when it was first discussed, says Mr. Fearne, the law on the subject was so far settled, that lawyers might, at least, form a *probable conjecture, if not opinion*, respecting questions of the same nature, (Fearne on Conting. Rem. 238); when it was argued in the King's Bench, says the reporter, "the cases cited were many and difficult to reconcile, *each side had a string of them*." (4 Burr. 2586.) The doctrine in *Shelly's case*, (4 Co. 104. b.) which Lord Mansfield's opponents strive to apply to this question, is admitted on all hands, to have been intended to secure to the feudal lord, his rights of wardship, marriage and relief, which have never been known in this country. How should such a case be decided on the principles of the *American* common law? A good dissertation on this question would be of great value to our profession, and throw considerable light on the fundamental principles of our *national* system of jurisprudence.

verting them into absolute estates.* The doctrine of survivorship in joint-tenancy is also done away. The law of primogeniture no longer subsists in any of the States. Conveyancing has been reduced to simple forms, and is no more an intricate science. Registries of deeds and mortgages have been established in every State.

The forms of proceeding in Courts of justice have also been greatly simplified, and the number of its officers reduced to a prothonotary or clerk and a common cryer. The costs of a law suit are comparatively trifling, and the law is accessible, to the poor as well as to the rich; a loose practice, it is true, has succeeded in our Courts to the strict forms of pleading, but it appears to work well to

* The following is extracted from the valuable work entitled "The Annual Law Register of the United States," published at Burlington, N. Jersey, by the Hon. William Griffith, formerly a Judge of the Circuit Court of the United States for the States of New Jersey, Pennsylvania, and Delaware. The volumes which have already appeared of this work are extremely interesting, as they bring together in one point of view the laws of the different States on the most important subjects. The use of this collection will appear from the following extract, made by a young gentleman of the law academy.

Of estates tail in the several States of the Union.

In *four* States never known to have been in existence, viz. Vermont, Illinois, Indiana, and Louisiana.

In *one*, viz. South Carolina, the statute *de donis* never was in force, but fees conditional at common law prevail.

In *twelve* they have been abolished or converted by statutes into fee simple absolute, viz. New York, Ohio, Virginia, North Carolina, Georgia, Missouri, Tennessee, Kentucky, Connecticut, Alabama, Mississippi, and New Jersey, but in the last *four*, a kind of estate tail still exists, being for the life of one donee or a succession of donees *then living*.

In *six* they may be barred by deed, acknowledged before a Court or some magistrate, viz. Rhode Island, Maine, Pennsylvania, Massachusetts, Maryland, and Delaware, but in the last four may also be barred by fine and common recovery.

And in *one* only do they exist as in England with all their peculiar incidents viz. New Hampshire.

all practical purposes. Even in England, pleading is at present but the shadow of what it once was ; in most personal actions, the declarations declare nothing, as in ejectment, and in actions of general *indebitatus assumpsit*, and particularly that for money had and received to the plaintiff's use. Neither do the general pleas at present used disclose the real grounds of the defence. In this manner that overwrought system has reacted upon itself. It must be admitted, however, that it has produced the forms of criminal indictments still in use, the excellence of which can only be duly appreciated by comparing them with the *acts of accusation* of other countries.*

* I have before me the indictment or *acte d'accusation*, in the case of the murderers of Fualdes, on their second trial at Alby, in France, in the year 1818. It is of immense length, and this length is not produced by harmless tautology or the repetition of mere words of form, nor by stating the case in different ways, in order to make the allegations and proofs exactly agree ; but it is a minute and circumstantial narrative, not only of the particulars which attended the perpetration of the criminal act, but of all the evidence with its successive variations, the conduct of the accused and of the witnesses on their examinations ; and all the gossip which occurred in the course of the preparatory proceedings. All this is narrated in an inflated, rhetorical style, well larded with epithets, and stuffed with declamation, and every thing in the instrument appears designed for theatrical effect, and calculated to make a strong impression upon the jury and the public against the accused. A few extracts will show what I mean.

After relating the circumstances of the murder with all their disgusting details, the Attorney General proceeds :

"After the *unhappy* Fualdes had lost his life in the *most barbarous* manner, his corpse was wrapped in a sheet and blanket, tied up, like a bale of goods, with cords of the thickness of a finger," &c.—The remainder of the details is in the same style.

The accused being all joined in the same indictment, the part which each took in the murder is separately noticed : the following is the charge against *Anne Benoit*, one of them.

"*Anne Benoit* co-habited with *Baptiste Collard*, in the house which was the theatre of the crime. On the 19th of March, about 8 o'clock in the evening, she was found concealed in the street *Hebdomadiers* near the house of *Mis-*

Thus far we have improved on the common law, the honour of further improvements is still in reserve for us. While the common law is and ever will be the best system of political and criminal legislation that has ever been known, I cannot say

sonnier. By her own avowal, the *fatal* handkerchief with which the *unhappy* Fualdes was gagged, belongs to her ; she *blushed* when somebody told her that no doubt she had lent it to Baptiste Collard, her *pretended* husband, to strangle therewith the Sieur Fualdes."

Madame Manson, originally a witness in the cause, but in consequence of having wavered and varied in her depositions, now charged as an accomplice, in order, by working upon her fears, to extract from her more explicit testimony, is indicted in these words :

"A woman named Manson, born Enjelran, after having declared before the prefect of the Aveyron, that she had been an eye witness to the murder of Fualdes, that she was in Bancal's house at the moment when it was committed, that she had been exposed to the greatest dangers ; after having made the same avowal to divers persons, appeared at the trial and denied the facts ; she swore she never had been in Bancal's house, and her assertions being contradicted by her *countenance*, her *looks* and her *gestures*, the sight of the accused produced in her *convulsions*, and real or simulated *faintings*, several times during the sitting, she fell, or *appeared* to fall into a *swoon* ; the words 'dagger'—'murder'—*escaped from her lips*," &c. concluding that *because* she has thus varied in her testimony, she is now indicted as an accessory to the murder.

The whole is in the same style, calculated to overwhelm the accused, and to present them to the jury, not so much for trial as for conviction.

This form of indictment is not borrowed from the civil law ; for the civilians maintain that such an instrument ought to contain only what is material and indispensably necessary to understand the true grounds of the accusation, which they express by the following doggerel line :

Quis, quid, ubi, quibus auxiliis, cur, quomodo, quando.

This is in fact all that is necessary to be stated ; but the French attorneys general have preferred adopting the inquisitorial form now in use, which is, undoubtedly, better calculated for the display of eloquence than for the attainment of justice.

At the same time I must acknowledge that there is in the present mode of administering criminal justice in France something well worthy of imitation, even in this country. In the discussions which take place, whether on a trial or law argument, the accused always has the *last word*. It is so likewise in Scotland.

I think it entitled to the same praise in what may properly be called the *jus civile*, I mean that part of the law which governs the construction of contracts between man and man, and establishes the rules of *meum* and *tuum*. In this part of the system too much remains of those subtle and nice distinctions originally introduced by the false logic of the schools, and preserved by the force of custom and respect for antiquity. The habit of reasoning on artificial principles still continues in England; hence their jurists too often generalise where they should distinguish, and distinguish where they should generalise. Thus they lay hold of some general principle, as for instance "that a factor has no right to pledge his principal's goods," and apply it indiscriminately to almost every case.* Thus the rule *caveat emptor*, borrowed from the civil law and applied there only, for obvious reasons, to sales of slaves, horses, and cattle,† is applied in England to all species of dealings, to the great detriment of commerce.‡ Thus a distinction is raised between obligations arising from contracts and those imposed on the party by the operation of law; what excuses from the performance in the one case, is held not to do so in the other; a rule which is not founded

* *Pickering v. Bush*, 15 East, 44. *Martins v. Coles*, 1 M. & Selw. 146.

† *ff lib et. De Edilitio Edicto*, tit. 1.

‡ *Chandler v. Lopez*, Cro. Jac. 4. *Bree v. Holbeck*, Doug 655. *Parkinson v. Lea*, 2 East, 314, and numerous other cases. This doctrine is approved of even in a Treatise on *Equity*, 1 Fonb. 380, *in note*. Mr. Wooddeson calls it an *unconscientious maxim*. 2 Wood. lect. 415. In South Carolina, it is not considered to be law, even as respects the sale of slaves, *Timrod v. Shoolbred*, 1 Bay, 319; *Whitfield v. McLeod*, 2 Bay, 380; *Lister v. Exrs. of Graham*, 1 Rep. Const. Court, 182.

either on reason or justice.* It is said that Judges are not to make contracts for the parties, but to explain them. This is perfectly true, but it is not perceived that this literal construction leads to the very error which is wished to be avoided; for neither party could possibly foresee at the making of a contract all the accidents that might impede or prevent its performance, and the Judges who so decide, virtually insert the words "at all events" which the instrument they are construing does not contain. Our own Judge M'Kean very properly, in my opinion, overruled this doctrine in the case of *Pollard v. Shaffer*,† and it seems it was also formerly denied to be law in the Court of Chancery in England.‡

These and other similar rules, however unjust, might perhaps be tolerated in a mere municipal code; but when we find them introduced into the commercial and maritime law, as for instance in the case of *Cook v. Jennings*,§ and other subsequent cases, in which the elegant doctrine of freight *pro ratâ itin-*

* So late as the year 1802, Lord Alvanley, Chief Justice of the English Court of Common Pleas, was pleased to say, that this doctrine, as laid down in the case of *Jane v. Paradyne*, Allyn, 26, is founded on much good sense. *Touteng v. Hubbard*, 3 Bos. & Pul. 300. I have often derived much pleasure and instruction from the opinions of this learned Judge and eminent jurist; I am therefore the more astonished at his having gone so far to vindicate a principle, which in his country may, indeed, be venerable from its antiquity, but cannot stand the test of close and logical investigation. This shews how difficult it is even for the greatest minds to divest themselves of ancient prejudices, particularly when seconded by the soft whisperings of national pride.

† 1 Dall. 210.

‡ 3 Bur. 1639.

§ 2 Term Rep. 381.

ris, laid down by Lord Mansfield in the case of *Luke et al v. Lyde** is made to yield to the niceties of the Norman school, we lament that this beautiful system of general jurisprudence, which belongs not to one nation, but to all the world,† should be disfigured by a forced adaptation to certain local theories. This is what I am sorry to say has happened in England. The law of freight, insurance, &c. is, in many important and substantial points, different there from what it is in the rest of the world, and no impartial jurist will say that it has been improved by the anomalous doctrines that have been introduced into it. Some of them are contrary to every principle of sound jurisprudence. This is not the place to advert to them in detail; but I may instance the rule which makes the sentences of foreign Courts of admiralty conclusive in a suit on a policy of in-

* 2 Bur. 889.

† Thus in mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature, the law merchant which is a branch of the law of nations is regularly and constantly adhered to, so that in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but the *great universal law*, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. 4 *Black. Com.* 67.

The maritime law is not the law of a particular country, but the *general law of nations*; non erit lex alia Romæ, &c. Lord MANSFIELD, in *Luke et al. v. Lyde*. 2 Bur. 887.

C'est par le droit des gens que la navigation a toujours été régie. Elle est le lien de la société des peuples. Chez les nations commerçantes, les loix maritimes sont à peu près les mêmes, attendu la réciprocité des intérêts. On doit donc avoir recours aux Loix des autres peuples, soit pour mieux connoître l'Esprit des ordonnances du Royaume, soit pour décider les cas qu'elles n'ont pas prévu. 1 *Emerigon*, 21.

surance.* This doctrine is evidently unjust in a belligerent nation that insures for neutrals and both unjust and impolitic in a neutral nation that insures for its own citizens. I might also animadvert upon the doctrine by which the owner of a ship is allowed the benefit of the clause in a policy of insurance against barratry of the master,† thus enabling him to throw upon third persons the responsibility which the law imposes upon him for the acts of his servant; also that which impairs the obligation of a first contract of insurance, by compelling successive underwriters to contribute, when the property is overinsured;‡ the narrow construction given to

* *Bernardi v. Motteux*, Dougl. 554. *Lothian v. Henderson*, 3 Bos. & Pul. 499.

† *Havelock v. Hancill*, 3 Term. Rep. 277.

‡ *Marshall on Insurance*, 146. There is no maxim better established in English jurisprudence and, indeed, in that of all the world, than that Judges are not to make the law, but to expound it, and that they are by no means to substitute for it their own ideas of right or wrong. But here is a very strong example to the contrary. The law had been settled in England in the case of the *African Company v. Bull*, (1 Shower, 132. Gilb. 238,) and the custom, says the reporter, had been proved plainly and fully by all the exchange, that the first underwriters in a case of over insurance, were to pay the loss to the extent of their policy, and the others successively, until the whole loss was satisfied. Yet, Lord Mansfield, yielding to a sudden notion of superior equity, in two successive cases at Nisi Prius, *Rogers v. Davis*, and *Davis v. Gilbert*, (Beaves L. M. 242) thought proper to set aside the established law, and to introduce the principle of contribution, because there was something *equalising* in it that struck his fancy. If he had taken the trouble to consult the foreign writers, with whose works at other times he appeared familiar, he would have found that the rule which he thus abolished, was not only the law of England, but that of all the commercial world, and if he had reflected upon the subject, which he was well able to do, he would have been satisfied that he was not at liberty to modify the contract between the insured and the first underwriters, it being a complete bargain and sale of eventual profit on the one side and of indemnity on the other. (*Roccus, de assec.* note 3.) His reputation, however, sanctioned the new principle, I am sorry to say, not only in England but in this country, and the con-

the words "perils of the sea"* and a multitude of other anomalies differing from the general law received by all the commercial world besides, and which in theory, at least, is a part of the common law."†

sequence has been that our underwriters are compelled to insert in their policies, a special clause which makes the old doctrine the rule between them and the insured. I presume that the same thing takes place in England. Mr. Marshall remarks that the custom *proved by all the exchange seems* now to be forgotten. (Marsh. 149.) They may, however, do in England as they please; but the question in this country is, are we bound by such decisions? I leave the answer to those who are competent to give it.

* Marshall, 487.

† Mr. Ingersoll, in his interesting Discourse on the influence of America on the mind, delivered before the American Philosophical Society, on the 18th of October last, has justly observed that "British commercial law is, in many respects, inferior to that of the continent of Europe." p. 35. When it is considered that Great Britain is beyond a doubt the first commercial nation in the world, this assertion may appear very bold, and yet it is perfectly correct. A great number of mistaken and erroneous decisions and opinions of the English tribunals in cases of commercial law may be pointed out in the books of Reports, going no farther back than Lord Holt's decision in *Clerke v. Martin* (2 Ld. Raym. 757,) in which that great Judge, who in other respects is highly entitled to our veneration, thought he had discovered that promissory notes or notes to order, were not within the custom of merchants, but had been *invented by the brokers in Lombard street*; while it is well known that even the canon law recognised them as mercantile instruments and as a species of bills of exchange, so early as the year 1571 (See Pragmatic of Pope Pius V. *De Cambiis*;) and it is also known that at the time when Lord Holt declared these instruments to be a late English invention, the celebrated commercial ordinance of Lewis XIV. of the year 1673, had been thirty years before the world, in which promissory notes were recognised and classed with bills of exchange, and in fact they had been in use for more than one hundred years among merchants throughout Europe. And yet at this day it would, perhaps, be error in an English Court to declare on these notes as on the *custom of merchants*. Lord Mansfield is celebrated for his improvements on English mercantile law; he was certainly a man of the most extraordinary genius; but he was not sufficiently acquainted with the subject either by study or by experience, and so committed a number of mistakes, and his successors have done the same, often by pretending to correct his decisions in cases in which his luminous mind had directed him right. It is important to Americans to know these truths: If I am allowed life and leisure, I may one day develop them in such a manner as will leave no

Whatever may be the cause from which these defects arise, they disfigure a system which, without them, would be the most perfect, and even with them, is, taken all in all, the noblest in the universe. It is in our power to correct these faults, to shew to a great, learned, and intelligent nation their own common law improved by their sons, and thus to repay them for the benefit they have bestowed by imparting it to us.

It is understood that Congress are seriously thinking of exercising the various and important legislative powers entrusted to them by the Constitution. A criminal code is said to be in contemplation. It is to be hoped, that under their general power to regulate commerce, they will enact an uniform maritime and commercial code, and that in preparing it they will avail themselves of the wisdom of all the commercial nations. They will remember what was said by the great Lord Mansfield in the case of *Hamilton v. Mendez*, "that the daily negotiations of merchants ought not to depend on niceties and subtleties, but on rules and principles founded on the dictates of *common sense*."*

doubt of the correctness of Mr. Ingersoll's assertion. All this has proceeded from endeavouring to apply to the liberal system of mercantile law, the quaint and subtle theories of the old common law jurists, and from disdaining to obtain knowledge from the works of foreign legislators and juridical writers.

* 2 Bur. 1214. Sixteen years afterwards, the same illustrious Judge, in the case of *Buller v. Harrison*, in an unguarded moment, ventured to assert, that "it is of much more consequence that *mercantile* questions should be fully settled and ascertained, than which way the decision is." Cowp. 567. This last opinion has been but too much followed, while the first seems to have been almost entirely forgotten, and yet, nothing is more certain than that of all the branches of jurisprudence, there is none more easily reducible to clear principles than *mercantile law*.

If American jurists wish to obtain the respect of those of Great Britain, it is not by servilely echoing their decisions and opinions; it is by shewing them that the science of jurisprudence is not exclusively theirs, by decently contradicting them when a proper occasion offers, and by correcting their errors when discovered, at the same time submitting to their just correction of our own.

It must not be believed that the writings and opinions of our jurists are not noticed by the men of mind of our profession in that country. In the year 1808, the doctrine of conclusiveness of the sentences of foreign Courts of admiralty was to all appearance finally and solemnly settled, on long and elaborate arguments, in the House of Lords, in the case of *Lothian v. Henderson*.* About that time this doctrine, fatal to our neutral interests, was much discussed in this country, and its discussions drew forth the talents of Judge Livingston, Judge Cooper, Mr. De Witt Clinton, the late Mr. Dallas, and several others. In the year 1808, notwithstanding the solemn determination that I have mentioned, we find this doctrine shaken almost to its foundation by two decisions of the Court of King's Bench in *Fisher v. Ogle* and *Donaldson v. Thompson*† In one of those cases, Lord Ellenborough observed, that "it was by an *overstrained comity* that foreign sentences had been received as evidence of the facts which they averred;" and in the other, that "*he should die with Lord Thurlow in the opinion*

* 3 Bos. & Pull. 499.

† 1 Campb. N. P. 418, 429.

that they should not have been so received." This sudden change of sentiment in the English Supreme Bench can only be ascribed to the effect of the writings of American jurists. About the same period, but before these decisions were given, Sir Charles Abbott, now chief justice of that Court, was writing his able treatise on the law relative to merchant ships and seamen, in which this doctrine of the conclusiveness of foreign sentences came incidentally under his view. After stating, as usual, that it is founded on an "established rule of the law of nations," he concludes, nevertheless, with saying, that the Courts of justice in his country have adhered to it "*with the dignity belonging to regular and permanent establishments.*"* It is impossible not to perceive that this apology and the sarcasm that accompanies it were not meant for his countrymen. If the doctrine in question was founded on an established rule of the law of nations, it wanted no apology of any kind, much less was it necessary to speak of the "*dignity of regular and permanent establishments.*" This was evidently meant as a proud answer to the American jurists who had written on this question and had demonstrated the injustice which was done to neutral sub-

* "It would be unjust to charge the master or owners for some cases of omission, upon which ships were condemned in France during the late war, although the terms of the condemnation were such as to *discharge the insurers from their responsibility*, according to the rule of the LAW OF NATIONS, which holds the sentence of a foreign Court to be conclusive of the fact on which it is founded, and to which rule the Courts of justice in this country adhered *with the dignity belonging to regular and permanent establishments.*" *Abbott on Shipping*, 263. See above, p. 15.

jects who caused their property to be insured in Great Britain. Such indirect marks of respect, proceeding from such sources, however they may be disguised, are truly flattering to us in a national point of view, and ought, for some time at least, to be sufficient to satisfy our reasonable ambition, and encourage us to proceed in the investigation of science, by which we shall not only spread instruction among ourselves, but disseminate light beyond the bounds of our own country.

But to return to our subject—

General jurisprudence is a part of the common law, but its rules and principles are not exclusively to be found in common law writers. That science ought to be studied, particularly in this country, where a light is to be held to the judiciaries of twenty-four different States. Whence is this light to proceed, but from the writings and discussions of liberal and learned jurists? The conflict of opinions will produce truth, and truth at last will find its way every where. The law should be treated as every other science; its theories should be scanned, and its defects pointed out; the excellent principles with which it abounds should be confronted with the decisions in which they have been either forgotten or misapplied, and this course should be pursued until the whole system at last shall be founded on the basis of universal justice. For justice, not in form merely, but in substance is a debt which is due by every government to its citizens.

Sir William Jones, in England, endeavoured to

point out this noble path to his countrymen, and with that view published his excellent treatise on the law of bailments. But the age was not prepared for his doctrines, the lights that he shed on our science were too strong for the eyes of his contemporaries; he was sent to India in honourable exile, there to waste his gigantic powers in curious, indeed, but fruitless disquisitions on oriental languages and antiquities. Romilly did much while he lived. Mackintosh is still alive for the good of his country and of mankind.*

Those who wish to see uniformity of jurisprudence in this widely extended union, ought to remember that nothing is uniform but sound principles, and that false theories and false logic lead inevitably to contradictory decisions. In England, there is in fact but one great judicature, sitting at Westminster. Although divided into different tribunals, the same spirit pervades them all, and in important cases the twelve Judges meet together to decide. Above them is the House of Lords, whose judgments are final and conclusive. Here we have, on the contrary, twenty-four different supreme judicatures, with a countless number of inferior tribunals, dispersed over an immense extent of territory. Beyond them there is no authority whose decisions are binding in all cases. The Supreme Court of the United States is limited in its

* In this country we have to regret that Chancellor Kent, one of the greatest luminaries of our science, by the effect of an impolitic provision in the Constitution of his own State, has been displaced from the office which he so many years filled with honour, because he was—sixty years old.

jurisdiction and powers, and except in certain matters of national concern, State Judges do not conceive themselves bound to conform to their opinions. In short, there is no polar star to direct our uncertain wanderings. We must then either tacitly submit to receive the law from a foreign country, by adopting the opinions of the English Judges, however they may vary from our own, or even from those which they formerly entertained, or we must find some expedient to preserve our national independence, and at the same time to prevent our national law from falling into that state of confusion which will inevitably follow from the discordant judgments of so many co-ordinate judicial authorities. Already the evil is felt in a considerable degree ; it will be more so in process of time, and it is to be feared, that in the course of fifty years the chaos will become inextricable, unless a speedy remedy is applied.

The only remedy that I can think of is to encourage the study of general jurisprudence, and of the eternal and immutable principles of right and wrong ; of that science by which Cicero enlightened, not only the prætors of his days, but the Judges of succeeding ages, and which, I am sorry to say, has fallen too much into neglect. When the principles of that science are sufficiently disseminated, they will fructify, and statutes and judicial decisions will gradually take their colour from them. System will be introduced where it is wanted. Sound theories will take the place of false ones, and

the rules of genuine logic will direct their application to particular cases. All this will be done gradually and insensibly, and the benefit of it will be felt by our remotest posterity. Otherwise, it is to be feared, that other and worse remedies will be applied; for every one of us must be sensible that the evils which I have mentioned are generally felt, and that the spirit of innovation is abroad; a spirit which manifests itself by rash and undigested experiments, and sometimes by demolishing without re-building, so that at last we shall be reduced to a state of confusion worse confounded.

It is therefore incumbent on the rising generation to apply themselves to the study of those general principles, which, if that spirit should continue to exist, will enable them at least to direct it into its proper channel, and prevent the axe from being applied at last to the root of the tree. •

Those who may think that there is an advantage in the science of the law being involved in mysteries and artificial theories, are egregiously mistaken. The science of medicine was so once, when genius lashed it with the pen of Moliere. Since it has abandoned its senseless nostrums and formulas, and fixed itself firmly on the basis of fact and experiment, it has considerably gained in respect, honour, and emolument. By pursuing a similar course, the legal profession will receive similar rewards.

I do not mean to say that theory should at once

S

supersede established rules, or that the student should erect himself into a legislator. I have no such preposterous ideas. Your studies are principally to be directed to the law, as it is, and with a view to its regular practice: hence in our ordinary exercises I have avoided touching upon such subjects as this, and I have explained the laws to you as they are found in our books and in the decisions of our tribunals. But on this occasion, I cannot forget that there are some of you who are destined to be one day the Judges and legislators of our country. To those who are fired with this noble ambition, I have particularly addressed the preceding observations, not to diminish the respect which they owe to the laws by which we are governed, but to shew the utility of the principles of general jurisprudence, and what benefits may be derived from them.

Nor must it be believed that I am a friend to rash and sudden innovation; on the contrary, I am well convinced that amendments in the laws ought to be gradual and almost insensible, and that the delicate chisel, and not the rough axe, is the instrument to be employed; but the delicate chisel can only be skilfully used by the masters of the art. I would compare our system of laws in this respect to one of those ancient statues of Phidias or Praxiteles, which have been in part mutilated or defaced by the hand of time: an able sculptor, and not a stone mason, should be called upon to repair it.

The true principles of jurisprudence, in order to fructify, ought first to take root in the minds of the members of the legal profession. Then, and not till then, will false principles gradually give way, as the ripe fruit falls from the tree. But in order to produce that effect, we ought to invite each other to reflection on these important subjects by learned treatises and free discussions, and the labours of the jurist ought not to be confined to mere compilations. In short, jurisprudence ought to be treated as a philosophical science. If Montesquieu had not written, the distinction between the three powers of government would be yet unknown, and their limits undefined. If Beccaria had not written, the torture and its horrid concomitants would not have disappeared from the face of Europe, and sanguinary codes would not almost every where have given way to mild punishments. All the amendments which Blackstone in his Commentaries suggested to be made in the common law, have been adopted, and some of them improved upon in this country, and it is only to be regretted that he did not suggest more.

But as I have observed, these suggestions ought to come from those who have made legislation their peculiar study, and ought to be made in the grave and solemn manner which the subject requires. They ought to be addressed to the understanding of those who are best able to judge of them.

Therefore, I address myself exclusively to the profession, by whom I expect to be understood

and appreciated. To their tribunal I submit the observations I have ventured to make, soliciting only brotherly indulgence.

The common law is destined to acquire in this country the highest degree of perfection of which it is susceptible, and which will raise it in all respects above every other system of laws, ancient or modern. But it will not have fully reached that towering height, until the maxim shall be completely established in practice as well as in theory,

THAT PURE ETHICS AND SOUND LOGIC ARE ALSO
PARTS OF THE COMMON LAW.

ADDENDA.

CONTAINING,

- I. A BRIEF SKETCH OF THE NATIONAL JUDICIARY POWERS EXERCISED IN THE UNITED STATES, FROM THE FIRST SETTLEMENT OF THE COLONIES TO THE TIME OF THE ADOPTION OF THE PRESENT FEDERAL CONSTITUTION. BY THOMAS SERGEANT, ESQ.**
- II. AN ADDRESS DELIVERED AT THE OPENING OF THE LAW ACADEMY OF PHILADELPHIA, BEFORE THE TRUSTEES AND MEMBERS OF THE SOCIETY FOR THE PROMOTION OF LEGAL KNOWLEDGE, IN THE HALL OF THE SUPREME COURT, ON WEDNESDAY, THE 21ST OF FEBRUARY, 1821. BY PETER S. DUPONCEAU, LL.D.**

1. $\lim_{x \rightarrow 0} \frac{1}{x} = \infty$

ADDENDA.

I.

A BRIEF SKETCH OF THE NATIONAL JUDICIARY POWERS EXERCISED IN THE UNITED STATES, FROM THE FIRST SETTLEMENT OF THE COLONIES TO THE TIME OF THE ADOPTION OF THE PRESENT FEDERAL CONSTITUTION. BY THOMAS SERGEANT, Esq. VICE PROVOST OF THE LAW ACADEMY OF PHILADELPHIA.

THE States of which our Union was at first composed, during the period antecedent to the adoption of the Constitution, while they were colonies of the British empire, and while they were connected together at first by the Congress, and afterwards by the articles of confederation, exercised within their respective limits the main portion of the judicial authority of the country through the medium of tribunals constituted by themselves, and governed by the common law, the principles of equity, their own acts of Assembly and usages, and such British statutes as had been extended to or adopted by them. But, during this period, there were judicial controversies over which the colonial or State Courts did not entertain jurisdiction at all, or entertained it in subordination to, or by delegation from, the national authority, residing in a power supposed to be the depository of a common interest, and possessing a general jurisdiction.

This period may be divided into three parts—

1. The government and jurisdiction of the crown of England began with the settlement of the colonies, and continued until the 5th September, 1774, when a Congress first met to consider of the public grievances, and gradually prepared for and repelled hostilities. At this era the revolution commenced.

2. The government by a Congress continued till the 1st March, 1781, when the articles of Confederation were finally ratified.

3. On the 4th March, 1789, the articles of Confederation were superseded by the adoption of the present Constitution.

It is proposed to consider the subject under these three divisions.

I. *Of the period that elapsed while the colonies were dependent upon the crown of England.*

During the period antecedent to the revolution, Courts of vice-admiralty were established in some, and probably in all of the States, by the crown of Great Britain; in some instances, by a right reserved in their charters, and in others without. The nature and extent of their jurisdictions depended on the commissions of the crown, and acts of parliament conferring additional authorities. The commissions of the crown gave the Courts which were established a most ample jurisdiction over all maritime contracts, and over torts and injuries as well in ports as upon the high seas; and acts of parliament enlarged, or rather recognised this jurisdic-

tion, by giving or confirming cognisance of all seizures for contraventions of the revenue laws.*

* *De Lovio v. Boit*, 2 Gall. 470. In the charter of Massachusetts, in 1692, there is an express reservation of the exclusive right in the crown to establish Admiralty Courts by virtue of commissions issued for this purpose. *ib.* No such reservation, however, is contained in the charter of William Penn, granted the 4th March, 1680. On the contrary, it gives to William Penn and his heirs, their deputies and lieutenants, power to appoint and establish any Judges and justices, magistrates and other officers whatsoever, for what causes soever, (for the probates of wills and for the granting of administrations,) with what power soever, and in such forms as to them should seem most convenient: and by judges by them delegated to award process, hold pleas, and determine all actions, suits, and causes whatsoever, as well criminal as civil, real, personal, and mixed. *Sec. 5.* By a subsequent part of the charter, William Penn, his heirs, or assigns, were made personally responsible for any misdemeanours committed or permitted by them against the laws of trade and navigation, and subjected to forfeiture of the charter for not paying the damages awarded by the Courts of Westminster. *Sec. 14.* A Court of vice-admiralty was, notwithstanding, established at an early date for the province of Pennsylvania, and the territories or counties of New Castle, Kent, and Sussex, on the Delaware. It existed in 1708, 1 *Proud's Hist. Penn.* 486, and continued till the revolution. I have perused the records of this Court from the year 1735 to the year 1746, in the course of which time there were three different commissaries or Judges of the Court, which was held at Philadelphia. They were commissioned by the Crown under the great seal of the High Court of Admiralty of England: but the commission itself I have not met with. During the vacancies that occasionally occurred, the proceedings were carried on in the name of the Lords Commissioners for executing the office of Lord High Admiral of Great Britain. *Brown*, in his *Civil and Admiralty Law*, says, that all the powers of vice-admiralty within his majesty's dominions are derived from the High Admiral or the Commissioners of the Admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commission, the Lords of the Admiralty are authorised to erect Courts of vice-admiralty in North America, the West Indies, and the settlements of the East India Company. 2 *Bro. Civ. and Adm. Law*.

It is presumed, says Judge STONER, in the note to his learned opinion in *De Lovio v. Boit*, that the commissions are usually in the same form. One of the latest is to the Governor of the royal province of New Hampshire, in 6 Geo. 3, (1766.) It authorises him "to take cognisance of, and proceed in all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, actions and demands, accounts, charter parties, agreements, suits, trespasses, inquiries, extortions, and demands, and business, civil and maritime, whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other ves-

T

In England the Court of Admiralty never possessed any jurisdiction in revenue causes; that was

sels, and merchants, or others whomsoever, with such owners and proprietors of ships and all other vessels whatsoever, employed or used within the maritime jurisdiction of our vice-admiralty of our said province, &c. or between any other persons, whomsoever had, made, begun, or contracted, for any matter, thing, cause, or business whatsoever done or to be done within our maritime jurisdiction aforesaid, &c. &c. and moreover in all and singular complaints, contracts, agreements, causes, and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers. And it declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh waters, rivers, creeks and arms as well of the sea as of the rivers and coasts whatsoever of our said province," &c. In point of fact, the Vice-admiralty Court of Massachusetts, before the revolution, exercised a jurisdiction far more extensive than that of the Admiralty in England. *De Lovio v. Boit*, 2 Gall. 470, 471, note. See also the *Little Joe*, *Stewart's Ad. Rep.* 394.

The commission to the Governor of New Hampshire above mentioned may, perhaps, be deemed an extension of the powers of the Courts of Vice-admiralty beyond former precedents. For we find the Congress of 1774 and 1775, on repeated occasions, complaining of these extensions by the crown, in order to enforce the obnoxious statutes passed to impose duties for the purpose of raising a revenue in America. The declaration and resolves of Congress of the 14th October, 1774, mention, among other grievances, that the British Parliament had extended the jurisdiction of the Courts of Admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county, 1 *Journ. Cong.* 27., and that the acts of 4 *Geo.* 3. c. 15, and c. 34, 5 *Geo.* 3. c. 25, 6 *Geo.* 3. c. 52, 7 *Geo.* 3. c. 41, and c. 46, & 8 *Geo.* 3. extended the power of the Admiralty Courts beyond their ancient limits. *ib.* 30. See also *ib.* 41. 47. In the address to the inhabitants of the colonies, of October 21st, 1774, it is stated, that in the year 1768 a statute was made to establish Courts of Admiralty and vice-admiralty on a new model, expressly for the end of more effectually recovering the penalties and forfeitures inflicted by acts of Parliament formed for the purpose of raising a revenue in America. *ib.* 48. See also *ib.* 51. 190.

By the records of the Vice-admiralty Court of Pennsylvania, &c. from 1735 to 1746, before referred to, it appears, that the business was inconsiderable. It consisted of proceedings by the Collector by information against vessels and goods for breaches of the acts of Parliament relating to the revenue: libels for seamen's wages; orders for surveys of damaged vessels and goods, and of wrecks, and appraisement thereof, with power to the commissioners appointed, to adjust the salvage in the cases of wrecks; records of protests; and, towards the end of the time, registers of letters of marque granted by the Governor, and prize proceedings, against vessels captured from the French and Spaniards.

appropriated by the common law to the Court of Exchequer. But the vice admiralty Courts in this country when colonies, and in the West Indies, obtained, by the provisions of the statute of 12 *Car. 2*, commonly called the navigation act, and 7 and 8 *Will. 3. c. 22*, a jurisdiction in revenue causes totally foreign to the original jurisdiction of the admiralty, and unknown to it; though it was held that appeals lay from them in such causes to the admiralty in England.*

There is one proceeding to authorise persons to take an inventory of the effects in a vessel, the master of which was drowned in the Delaware after arrival, and one other on a bottomry. It may be remarked, that although the proceedings are very formal, no instance appears of an answer or claim by a defendant or claimant on oath or affirmation.

* 2 *Bro. Civ. and Adm. Law*, 491. Yet the extent of the jurisdiction of the Admiralty Courts in the colonies seems to have been, for some time, a subject of considerable discussion and difference of opinion in England. In *Chalmers's* collection of the opinions of eminent lawyers on various points of jurisprudence, chiefly concerning the colonies, fisheries, and commerce of Great Britain, published at London in 1814, there are several opinions to be found on this subject. In July, 1702, *Sir John Cooke*, advocate-general, gave an opinion, that penalties and forfeitures under the act of navigation, 12 *Car. 2. c. 18*, the act for the encouragement of trade, 15 *Car. 2. c. 7*, the act for preventing planting tobacco in England, and for regulating the plantation trade, 22 and 23 *Car. 2. c. 26*, might be prosecuted in the Admiralty Courts of the plantations, as well as penalties and forfeitures under the act relating to the plantation trade, 7 and 8 *Will. 3. 2 Chalm. Opinions*, 193.

In August of the same year, the Attorney general, *Northey*, gave it as his opinion to the board of trade, that the jurisdiction of the Admiralty Courts of the colonies extended only to prosecutions under the 7th and 8th *Will. 3.* and did not embrace cases arising under the statutes of *Car. 2.* above mentioned. *ib.* 187.

In 1720, however, *Mr. West*, who was assigned as counsel to the Commissioners of trade and plantations, was of opinion, that the statutes 13 *Rich. 2. c. 5.*, 15 *Rich. 2. c. 3.*, 2 *Hen. 4. c. 11.* and 27 *Eliz. c. 11.* by which the admiralty jurisdiction in England was limited and confined, were not introductive of new laws, but only declaratory of the common law, and were, therefore, of force even in the plantations; and that none of the acts of trade and navigation gave the admiralty Judges in the West Indies an increase of jurisdiction beyond

In questions of prize in the vice admiralty Courts an appeal lay to the commissioners of appeals consisting chiefly of the privy council. In instance and revenue causes, it lay to the High Court of Admiralty in England, and thence to the delegates.* The power of the High Court of Admiralty to receive appeals from the vice admiralty Courts in revenue causes had been disputed, on the ground that they were not in their nature causes civil or maritime, but that it was a jurisdiction specially given to the vice admiralty Courts by the statute of 7 and 8 Will. 3. c. 22, which took no notice of any appellate jurisdiction in the High Court of Admiralty in such cases. But the point was fully settled in favour of this jurisdiction in the year 1754.†

Controversies between two of the provinces concerning the extent of their charter boundaries or the like, came before the King in his privy council, who exercised original jurisdiction therein, upon the principles of feudal sovereignty.‡ Thus in July

that exercised by the High Court of Admiralty at home. He was also of opinion, that the superior Courts of common law in New England had a power to grant prohibitions to the admiralty Courts, and states that prohibitions were the remedy constantly applied there to prevent their encroachment. *ib.* 200.

It is stated by the Attorney general *Northey*, in the above mentioned opinion, that an action of trover had been brought and was then depending in the Queen's Bench, against Col *Quarry*, the Judge of the Admiralty in Pennsylvania, for condemning in his Court an unregistered vessel for trading there.

* 1 *Wheat.* 19. 2 *Bro. Civ. and Adm. Law.* 493. *Blackstone*, (3 *Com.* 70,) says, an appeal also lay to the King in council. But this opinion of his seems to be relinquished. 2 *Bro. Civ. and Adm. Law.* 493.

† 2 *Bro. Civ. and Adm. Law.* 493, note. 2 *Rob.* 248. See the note of Mr. *Wheaton* to the case of the *Sarah*, 8 *Wheat.* 396.

‡ 1 *Bl. Com.* 231. 1 *Vez.* 444.

1764, the King in privy council approved the report of a committee of council for plantation affairs, relative to the disputes that had for some years subsisted between the provinces of New Hampshire and New York, concerning the boundary line between those provinces, and ordered and declared, the western banks of the river Connecticut to be the boundary line.*

A general superintending power by way of appeal was exercised by the King in council from the decisions of the colonial tribunals. For example, in year 1685, an appeal of William Vaughan, from a verdict and judgment against him in the Courts of New Hampshire, at the suit of Robert Mason, Esq. as proprietor of that province, for certain lands and tenements in Portsmouth in the said province, was heard by counsel before the committee for trade and plantations of the privy council, who reported that the verdict and judgment should be affirmed, and they were ratified and confirmed accordingly by the King in council.† And such appeals from the highest Court in Pennsylvania, and in the other colonies to the King in council were common before the revolution.‡

* 3 Belknap's Hist. N. Hampshire, 296. Appendix, No. XI.

† Ibid. 345. Appendix, XII.

‡ It would seem, however, that in some instances the appeal was first to the Governor and council, and from thence to the King in council. See the case of *Gordon v. Lowther*, 2 Ld. Ray. 1447, a case of that kind, brought from the Island of Barbadoes. In the same case it is stated that the rule was, that the party appealing must procure the proceedings to be transmitted, and proceed, within a year after the appeal allowed in the plantations: and the appeal in that case was dismissed under this rule. In Pennsylvania, (which was a proprietary government) no such appellate jurisdiction was entertained by the Governor and council before the revolution.

II. *Of the period during which the national authority was exercised by Congress.*

As a necessary consequence of the revolution, the judicial power of the crown in the then colonies, as well as all its other authority, ceased; and from the commencement of the war in April 1775, Congress with the approbation of the colonies and people, and from the emergency of the crisis, exercised the sovereign authority of the country, so far as related to war and peace. They raised armies and navies, and directed military operations, emitted bills of credit, made treaties, and received and sent ambassadors; commissioned privateers, prescribed the objects of capture, and made rules for the distribution of prizes. As the legality of all captures on the high seas depends on the law of nations, and a just and uniform execution of that law is essential to the sovereign power, which might be implicated with foreign nations in the results of its administration, Congress had for this purpose a right of maintaining a control by appeal, in cases of capture, as well over the decisions of juries as of Judges.* When Congress, therefore, in November 1775, first authorised the capture of English vessels of war, and of other vessels employed in the service and supply of the English armies, by vessels to be commissioned by Congress or their authority, they recommended to the several Legislatures of the united colonies, as soon as possible to erect Courts of justice, or give jurisdiction to

* *Penhallow v. Deane's adms.* 3 Dull. 80.

those in being, to determine concerning such captures ; the trials thereof to be by a jury, under such regulations as to the respective Legislatures should seem expedient ; but that in all cases an appeal should be allowed to Congress, or such person or persons as they should appoint for the trial of appeals, under certain provisos as to the time of demanding, and lodging the appeal, and giving security.*

The application to Congress on appeal was by petition, which, at first, was usually referred to a special committee appointed in each case, consisting of five members. But on the 30th January, 1777, Congress resolved to appoint a standing committee to consist of five members, to hear and determine these appeals, and to them the petitions were referred when presented † Three members were added in May, but in October following the number was restored to five ; they, or any three, to hear and determine.

The resolution of Congress of November 1775, above mentioned, was complied with by several States ; some allowing appeals to Congress on a larger, some on a more contracted scale. In some instances the acts passed by the States on the subject gave rise to questions concerning the respective authority of Congress, and of the States, which oc-

* 1 *Journ. Congress*, 259, 260 The State Courts of Admiralty also exercised jurisdiction in instance causes. See *Hopkinson's reports*.

† *Journ. Congress*. The first standing committee of appeals, which was appointed on the 30th January, 1777, consisted of Mr. Wilson, Mr. Sergeant, Mr. Ellery, Mr. Chase, and Mr. Sherman.

casioned much debate and difference of opinion in Congress, and elsewhere ; and some of these questions were not finally determined till after the adoption of the present Constitution. In July 1776, the Legislature of the State of *New Hampshire* passed an act which allowed an appeal to Congress, or persons appointed by them, only when the vessel capturing was fitted out at the charge of the united colonies ; in other cases the appeal was to be to the Supreme Court of judicature of that State.* A citizen of New Hampshire, acting under the commission of Congress, in a vessel owned by citizens of *New Hampshire*, in October 1777, captured a vessel as prize on the high seas. Being claimed by citizens of Massachusetts, a trial by jury took place in the New Hampshire Court maritime, erected by the act of that State, of July 1776, and the jury found a verdict for the captors. The claimants prayed an appeal to Congress, but the Court refused it, because it was contrary to the law of the State. The claimants then appealed to the superior Court and a jury ; there also a verdict was found for the captors. The claimants then prayed an appeal to Congress, and petitioned Congress, who referred it to the committee of appeals, and that committee decided in June, 1779, that they had jurisdiction. After the confederation, the Court of appeals reversed the decrees passed by the Courts

* In November, 1779, the Legislature of New Hampshire extended the license of appeal to Congress to every case wherein the subject of any . reign nation in amity with the United States should be interested in the dispute, and allowed it no further.

of New Hampshire, and in the year 1795, the Supreme Court of the United States, on appeal from the Circuit Court of New Hampshire, carried into effect the decree of the Court of appeals.*

In the case of the sloop *Active*, the jurisdiction of Congress was also disputed. In that case, on a libel in the Court of Admiralty of Pennsylvania, the jury found a verdict distributing the proceeds of a prize among certain claimants. From this sentence, or judgment, an appeal was taken to Congress, and the committee of appeals, in March, 1779, reversed the decree, and ordered process to issue out of the Court of Admiralty of Pennsylvania, to carry the decree of reversal into effect. The Judge of the Court of Admiralty refused to conform to this order, alleging as a reason the act of the Legislature of Pennsylvania, declaring that the finding of a jury should establish the facts in all trials in the Court of Admiralty, without re-examination or appeal; and that an appeal was permitted only from the decree of a Judge. Congress, however, resolved, in March, 1779, that their committee had jurisdiction, and made ineffectual efforts to induce the assembly of Pennsylvania to confer with them on the subject. After the adoption of the present Constitution, the decree of the committee of appeals was enforced in the Courts of the United States.†

* *Penhallow v. Doane's adms.* 3 Dall. 80.

† See *United States v. Peters*, 5 Cranch. 115. *Ross v. Rittenhouse*, 2 Idyll. 160. • *United States v. Bright and others*, 3 Hall's Law Journ. 225.

In January, 1780, Congress resolved to establish a Court for the trial of all appeals from the Courts of Admiralty of the States in cases of capture, to consist of three Judges with salaries, appointed and commissioned by Congress, two of whom should constitute a quorum. The Court was empowered to appoint a register. The trials therein were to be according to the usages of nations, and not by jury ; and they fixed the place of their first session at Philadelphia, and afterwards at such times and places as the Court should judge most conducive to the public good, so that they did not at any time sit further eastward than Hartford, in Connecticut, or southward than Williamsburg, in Virginia. On the 22d January, they elected the Judges by ballot.* The style of the Court it was subsequently resolved, should be the *Court of Appeals in cases of capture* ; and regulations were made as to the oaths of the Judges and Register, the time of entering and lodging appeals, and giving security ; and the causes depending, and the papers, were ordered to be transferred to this Court †

Applications were sometimes made to Congress to order this Court to receive appeals. In September, 1781, we find an application to Congress, and instructions by them to the Court, to receive an appeal, where, by the indisposition and death

* Mr. Wythe, Mr. Paca, and Mr. Hosmer, were elected. Mr. Wythe afterwards declined, and Mr. Cyrus Griffin was elected in his place.

† 6 Journ. Cong. 156.

of the Register of the Court of Admiralty of Pennsylvania, the stipulations were not executed in due form, and in due time.* In February, 1782. a resolution was adopted in another case, authorising the appeal.† On the other hand, they refused to interfere after the decision of the Court,‡ or in favour of a suitor in the Court of appeals when a loss was occasioned by such suitor or his friend.§

In February 1786, Congress resolved, that as the war was at an end, and the business of the Court of appeals in a great measure done away, the salaries of the Judges should cease.|| In June 1786, they were authorised to grant re-hearings or new trials, and a *per diem* allowance was ordered during the sitting of the Court and the time employed in travelling to and from the same.¶

In several instances applications were made to Congress, in relation to controversies between States concerning the rights of soil and jurisdiction. In December 1779, they resolved, that as it appeared, from the representation of the delegates of the State of Pennsylvania, that disputes had arisen between the States of Pennsylvania and Virginia, relative to the extent of their boundaries, which might be productive of serious evils to both States, and tend to lessen their exertions in the common cause, it be

* 7 Journ. Cong. 180. † *Ib.* 277. ‡ *Ib.* 280. § *Ib.* 271.

|| 11 Journ. Cong. 35.

¶ *Ib.* 123. By the act of Congress of the 8th May, 1792, sec.12, the records and proceedings of this Court are ordered to be deposited in the office of the Clerk of the Supreme Court of the United States, who is authorised to give copies; and such copies are to have like faith and credit as all other proceedings of said Court.

recommended to the contending parties, not to grant any part of the disputed land, or to disturb the possession of any persons living thereon, and to avoid any appearance of force, until the dispute could be amicably settled by both States, or brought to a just decision by the intervention of Congress; that possessions forcibly taken be restored to the original possessors, and things placed in the situations in which they were at the commencement of the war, without prejudice to the claims of either party.*

So, the disputes existing between the States of New York, New Hampshire, and Massachusetts, and the people inhabiting the present State of Vermont, then styled the New Hampshire grants, were brought before Congress by their applications, and Congress recommended laws to be passed by the respective States, expressly authorising Congress to hear and determine all differences between them, relative to their respective boundaries, in the mode prescribed by the articles of confederation, (which had then been agreed to in Congress, but were not ratified by all the States). New York and New Hampshire passed such laws, and a hearing before Congress took place.

A controversy subsisting between the States of Virginia and New Jersey, respecting a tract of land called Indiana, lying on the river Ohio, was, in consequence of instructions from the Legislature of New Jersey, to their delegates in Congress, and

* 5 Journ. Cong. 456.

the petitions of Indiana proprietors, heard before a committee of Congress, who reported in May 1782, that the purchase of the Indiana company was made *bona fide*, &c.*

During this period there existed nothing resembling the appellate authority from the tribunals of the respective colonies, previously exercised by the King in council.

III. *Of the government of the Union under the articles of confederation.*

The declaration of independence in July 1776, necessarily operated as a permanent transfer from the crown of England of the high national powers lately exercised by Congress, and was naturally followed by the establishment of a regular government, amongst whose different departments these powers might be distributed. Accordingly, the day after that on which the declaration of independence was resolved upon by Congress in a committee of the whole, (June 11th 1776,) a proposition was made, and a committee appointed, to prepare and digest the form of a confederation, to be entered into between the colonies.† The articles of confederation were agreed to in Congress on the 15th November 1777,‡ but were not to be conclusive until they were approved by the Legislatures of all the States.§ Eleven of the States ratified them in 1778, and one in 1779, and one State, the last of the thirteen, on the 1st March 1781. The completion of the ratification was announced by Cón-

* 7 Journ. Cong. 364. 9 Journ. Cong. 64. † 2 Journ. Cong. 207

‡ 3 Journ. Cong. 502.

§ Article 13.

gress on the 23d March, and the government commenced its operations

By the articles of confederation, the judicial power of the United States was defined and somewhat extended, though it was still restricted to very narrow limits. The ninth article provided, that the United States in Congress assembled, should have the sole and exclusive right and power, 1st. Of appointing Courts for the trial of piracies and felonies committed on the high seas. 2d. Of establishing Courts for receiving and determining appeals in all cases of captures: provided, that no member of Congress should be appointed a Judge of any of the said Courts. 3d. The United States in Congress assembled were also to be, by the same article, the last resort on appeal, in all disputes and differences then subsisting, or that thereafter might arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever, which authority was to be exercised by Judges, or commissioners, to be appointed in the manner therein particularly described, their judgment to be final; provided, that no State should be deprived of territory for the benefit of the United States. 4th. And all controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they might respect such lands and the States which passed such grants, were adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, were, on the petition of either party to Con-

gress, to be finally determined, as near as might be, in the same manner as the foregoing. Thus limited was the judicial power under the confederation.

1. An ordinance was very soon passed* for establishing Courts for the trial of piracies and felonies committed on the high seas, by which persons charged with these offences, or accessaries thereto, were to be inquired of and tried by the grand and petit jurors according to the course of the common law, in like manner as if committed on land. The justices of the Supreme or Superior Court of judicature, and Judge of the Court of Admiralty of the several and respective States, or any two or more of them, were thereby appointed Judges.† The punishment was to be the same as if the offence were committed on land. When there was more than one Judge of a Court of Admiralty, the supreme executive power of the State was to commissionate one (of them,) exclusively, to join in performing the duties required by the ordinance. All forfeitures were to go to the State, when conviction took place.

When Courts were held under the authority of this ordinance, the Judges sat in the State Court house, the prisoners were confined in the State gaol under the custody of State officers, and were executed, on conviction, by the order of the Sheriff.‡

* *April 5th, 1781. 7 Journ. Cong. 65.*

† By an ordinance passed in March, 1783, a Judge of the Admiralty was always to form one of the Court. *8 Journ. Cong. 146.*

‡ *2 vol. Debates of Congress, in 1789, page 286, speech of Mr. Smith of South Carolina.*

2. No new Court of appeals was constituted after the articles of confederation; but the Court, as then organised, appears to have continued. The extent of the judicial power of Congress under the articles of confederation, in appeals in cases of capture, seems, however, to have been narrowed considerably by the construction given to the articles of confederation in the State Courts. Thus in Pennsylvania, by an act of the Legislature passed prior to the complete ratification of the articles of confederation, a Court of appeals was constituted "for reviewing, re-considering, and correcting the definitive sentences and decrees of the Court of Admiralty of that State, other than in cases of capture upon the water in time of war from the enemies of the United States." A complainant filed a libel in the State Court of Admiralty, to recover damages against the defendant, for taking from him, on the high seas, an English vessel, which he had captured as prize, in which the State Court of Admiralty decreed damages and costs. On appeal to the State Court of appeals, that Court held, 1st. That an appeal did not lie in the case to the Court established by Congress, because the words of the articles of confederation authorising the establishing of Courts for receiving and determining finally appeals in all cases of capture, meant captures as prize, when such prize was brought *infra præsidia* of the United States, and, as the prize in this case was not brought *infra præsidia* of the United States, but was afterwards re-captured by the Bri-

tish, that Court had no jurisdiction. 2d. That the State Court of appeals had jurisdiction, because the Legislature intended to give it jurisdiction in appeals from the admiralty, in all cases in which the appeal was not resigned to the United States, and if this were not the case there would be a defect of justice.*

8. A Court consisting of five commissioners, organised under the articles of confederation, sat at Trenton, in November and December, 1782, to decide the controversy which had long subsisted between the States of Pennsylvania and Connecticut, relative to the territory of Wyoming. These States appeared respectively by counsel, as agents, and their proofs and arguments were heard. On the 30th December, 1782, the Court decreed unanimously, that the State of Connecticut had no right to the lands in controversy, and that the jurisdiction and pre-emption of all the territory lying within the charter boundary of Pennsylvania claimed by Connecticut, of right belonged to the State of Pennsylvania.†

Proceedings also took place in the year 1786 and 1787, for constituting Courts to determine controversies respecting territory, between the State of Massachusetts and New York, and also between the States of South Carolina and Georgia: but they were never completed, as these States amicably adjusted the disputes.‡

* *Talbot v. Comman'ers, &c. of three brigs.* 1 Dall. 95.

† 8 Journ. Cong. 83. The Court consisted of *William Whipple, Welcome Arnold, Wm. C. Houston, Cyrus Griffin*, and *David Brearly, Esqrs.*

‡ 12 Journ. Cong.

As well before as after the articles of confederation, Congress, by the exercise of an appellate jurisdiction in all cases of capture, had the means of enforcing the law of nations, so far as related to questions of prize. To enforce it in other respects, they were dependent on the aid of the State governments. In August 1779, they resolved, that the President and Supreme Executive Council of Pennsylvania be informed, that any prosecution which it might be expedient to direct for such matters and things in certain publications and transactions, as were against the law of nations, should be carried on at the expense of the United States.* In November 1781, they recommended to the Legislatures of the States to pass laws punishing infractions of the laws of nations, committed by violating safe conducts or passports granted by Congress; by acts of hostility against persons in amity with the United States: by infractions of the immunities of ambassadors: by infractions of treaties or conventions: and to erect a tribunal, or to vest one already existing with power, to decide on offences against the law of nations, and to authorise suits for damages by the party injured, and for compensation to the United States for damage sustained by them, from an injury done to a foreign power by a citizen.†

In the case of De Longchamps, who was convict-

* 5 *Journ. Cong.* 367. In the case of Cornelius Sweers in the year 1778, reported 1 *Dall.* 41, Congress employed counsel to prosecute in the State Court. 4 *Journ. Cong.* 494. See also 5 *Journ. Cong.* 283, in the year 1779.

† 7 *Journ. Cong.* 234.

ed and sentenced in the Court of Oyer and Terminer of Pennsylvania in the year 1784, for committing a violation of the law of nations by insulting M. Marbois, the secretary of the French legation, and for assault and battery, the Court declared, that the law of nations formed a part of the municipal law of Pennsylvania, and it seems enforced it.* No act appears to have been passed in this State in pursuance of the recommendation of Congress. After the arrest of De Longchamps the supreme executive council of Pennsylvania gave information of it in a letter to Congress, and requested their advice,† and the committee of States approved thereof.‡

On the 24th June, 1776, after independence had been resolved upon, but before it was declared, Congress defined allegiance and treason; declaring the latter to consist in levying war against any of the colonies within the same, or being adherent to the king of Great Britain, or other enemies of the said colonies, or any of them, within the same, giving to him or them aid or comfort; and recommended it to the Legislatures of the colonies, to pass laws for punishing persons proveably attainted of open deed by people of their condition. We find several instances of persons convicted in Pennsylvania in the year 1778, under the laws of that State, for treasons committed in that State.§

* *Respublica v. De Longchamps*, 1 *Dall* 111.

† 9 *Journ. Cong.* 277.

‡ 9 *Journ. Com. of States*, 6.

§ See 1 *Dall*, 35. 39.

In the ordinance passed in October, 1782, for regulating the post offices of the United States, (the power to establish and regulate post offices throughout the United States being vested in Congress by the articles of confederation,) Congress imposed penalties for official misdemeanors, which were made recoverable by action of debt in the name of the Post Master General, in the State where the offence was committed. But, generally speaking, they had no power to exact obedience or punish disobedience either by pecuniary mulcts or otherwise, but were dependent on the laws and tribunals of the several States; so that when laws became necessary to secure the interests of the Union, they were obliged to request the State Legislatures to pass them. Thus, for example, we find Congress in the year 1782, calling on the Legislatures of the States to pass laws, to empower commissioners appointed by Congress to settle the accounts of the military department, to call for witnesses and examine them on oath or affirmation, touching the accounts.* It was even necessary to pass a resolution to request them to enact laws, to enable the United States to recover from individuals debts due, and effects belonging to the United States.† And in July, 1784, we find the committee of States, (who sat during the recess of Congress,) complaining, that none of the State Legislatures had made the provision requested agreeably to their recom-

* 4 *Journ. Cong.* 83, in 1778. 5 *Journ. Cong.* 296, in 1779. 7 *Journ. Cong.* 298, in 1782.

† 7 *Journ. Cong.* 298.

mendation, by which the interest of the United States had already suffered greatly, and requiring that it should be done without loss of time, and again *earnestly* recommending the adoption of measures to enable the United States to sue for and recover their debts and effects and property, and any damages they had sustained or might sustain.*

Hence it appears, that all cases of national or local import were decided by the State jurisdictions exclusively, except disputes between States, questions arising under grants of land by two or more States in certain cases, of prize on appeal, and piracies or felonies on the high seas. To these may be added suits against one of the States in the Courts of another, which the latter refused to take cognisance of on the general principle that a State was sovereign, and one sovereign could not be sued in the Courts of another.† The State Courts exercised no jurisdiction in causes arising from a national impost or revenue; for none such existed prior to the present Constitution of the United States. State imposts existed, and the State tribunals entertained the causes arising out of them.‡

Under the confederation, no tribunal was vested with the appellate authority which before the re-

* 9 *Journ. Cong. Com. of States*, 39.

† *Nathans v. Commonwealth of Virginia*. 1 *Dall.* 77.

‡ See causes of this description reported 1 *Dall.* 62, 197. In Pennsylvania they were tried by jury.

volution was exercised by the King in council from the decisions of the Courts of the respective colonies.*

*The only judicial power analogous to this is, the appellate jurisdiction vested in the Supreme Court of the United States, under the present Constitution, from the highest State Courts, in cases arising under the Constitution, laws, or treaties.

Since the chief part of the above was printed, I have met with the form of a commission of Vice Admiral from the crown to a Governor, which corresponds with that mentioned by Judge STORY in his note to *De Lovio v. Boit*. It is contained in "A View of the Constitution of the British Colonies in North America and the West Indies, at the time the civil war broke out on the continent of America," published at London in 1783, by *Anthony Stokes*, then late Chief Justice of Georgia. As it exhibits the extent of the jurisdiction claimed by the Vice-admiralty Courts before the revolution, I have thought a copy of it here would prove interesting.

COMMISSION OF VICE-ADMIRAL.

George the Third, &c.—Greeting :

WE confiding very much in your fidelity, care, and circumspection in this behalf, do, by these presents, which are to continue during our pleasure only, constitute and depute you the said A. B. Esq. our Captain General and Governor in Chief aforesaid, our Vice Admiral, Commissary and Deputy in the office of Vice Admiralty in our province of F— aforesaid, and the territories depending thereon in America,

and in the maritime parts of the same and thereto adjoining whatsoever; with power of taking and receiving all and every the fees, profits, advantages, emoluments, commodities, and appurtenances whatsoever due, and belonging to the said office of Vice Admiral, Commissary, and Deputy in our province of F——, and the territories depending thereon, and maritime parts of the same and adjoining to them whatsoever, according to the ordinances and statutes of our High Court of Admiralty in England.

And we do hereby remit and grant unto you the aforesaid A. B. our power and authority in and throughout our province of F—— aforementioned, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, and also throughout all and every the sea shores, public streams, ports, fresh water rivers, creeks, and arms, as well of the sea as of the rivers and coasts whatsoever of our said province of F——, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, as well within liberties and franchises as without; to take cognisance of, and proceed in, all civil and maritime causes, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, accounts, charter-parties, agreements, suits, trespasses, injuries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever, with such owners and proprietors of ships and all other vessels whatsoever, employed or used within the maritime jurisdiction of our Vice Admiralty of our said province of F——, and the territories depending thereon, or between any other persons whomsoever, had, made, begun, or contracted for any matter, thing, cause, or business whatsoever, done or to be done within our maritime jurisdiction aforesaid, together with all and singular their incidents, emergencies, dependencies, annexed or connexed causes whatsoever or howsoever, and such causes, complaints, contracts, and other the

premises above said, or any of them, which may happen to arise, be contracted, had or done, to hear and determine according to the rights, statutes, laws, ordinances, and customs anciently observed.

And moreover, in all and singular complaints, contracts, agreements, causes, and businesses civil and maritime, to be performed beyond the sea, or contracted there, howsoever arising or happening: and also in all and singular other causes and matters, which in any manner whatsoever touch or any way concern, or anciently have and do, or ought to belong unto the maritime jurisdiction of our aforesaid Vice Admiralty in our said province of F—, and the territories depending thereon, and maritime parts thereof, and to the same adjoining whatsoever; and generally, in all and singular all other causes, suits, crimes, offences, excesses, injuries, complaints, misdemeanors, or suspected misdemeanors, trespasses, regrating, forestalling, and maritime businesses whatsoever, throughout the places aforesaid, within the maritime jurisdiction of our Vice Admiralty of our province of F— aforesaid, and the territories depending thereon by sea or water, on the banks or shores of the same howsoever done, committed, perpetrated, or happening.

And also to inquire by the oaths of honest and lawful men of our said province of F—, and the territories depending thereon, and maritime parts of the same and adjoining to them whatsoever, dwelling both within liberties and franchises and without, as well of all and singular such matters and things, which of right, and by the statutes, laws, ordinances, and the customs anciently observed were wont and ought to be inquired after, as of wreck of the sea, and of all and singular the goods and chattels of whatsoever traitors, pirates, manslaughterers, and felons howsoever offending within the maritime jurisdiction of our Vice Admiralty of our province of F— aforementioned, and the territories depending thereon, and of the goods, chattels, and debts of all and singular their maintainers, accessaries, councillòrs, abettors, or assistants whomsoever.

And also of the goods, debts, and chattels of whatsoever person or persons, felons of themselves, by what means, or howsoever coming to their death within our aforesaid maritime jurisdiction, wheresoever any such goods, debts, and chattels, or any part thereof, by sea, water, or land in our said province of F——, and the territories depending thereon, and maritime parts of the same and thereto adjacent whatsoever, as well within liberties and franchises as without, have been or shall be found forfeited, or to be forfeited, or in being.

And moreover, as well of the goods, debts, and chattels, of whatsoever other traitors, felons, and manslaughterers wheresoever offending, and of the goods, debts, and chattels of their maintainers, accessaries, counsellors, abettors, or assistants, as of the goods debts, or chattels of all fugitives, persons convicted, attainted, condemned, outlawed, or howsoever put or to be put in exigent for treason, felony, manslaughter, or murder, or any other offence or crime whatsoever; and also concerning goods waived, flotson, jetson, lagon, shares and treasure found or to be found; deodands, and of the goods of all others whatsoever taken or to be taken, as derelict, or by chance found, or howsoever due or to be due; and of all other casualties, as well in, upon, or by the sea and shores, creeks or coasts of the sea, or maritime parts, as in, upon, or by all fresh waters, ports, public streams, rivers, or creeks, or places overflown whatsoever, within the ebbing and flowing of the sea or high water, or upon the shores and banks of any of the same within our maritime jurisdiction aforesaid, howsoever, whensoever, or by what means soever arising, happening or proceeding, or wheresoever such goods, debts, and chattels, or other the premises, or any parcel thereof may or shall happen to be met with, or found within our maritime jurisdiction aforesaid.

And also concerning anchorage, lastage, and ballast of ships, and of fishes royal, namely sturgeons, whales, porpoi-

ses, dolphins, kiggs, and grampusses, and generally of all other fishes whatsoever, which are of a great or very large bulk or fatness, anciently by right or custom, or any way appertaining or belonging to us.

And to ask, require, levy, take, collect, receive, and obtain for the use of us, and to the office of our High Admiral of Great Britain aforesaid for the time being, to keep and preserve the said wreck of the sea, and the goods, debts, and chattels of all and singular other the premises; together with all and all manner of fines, mulcts, issues, forfeitures, amerciaments, ransoms, and recognisances whatsoever forfeited or to be forfeited, and pecuniary punishments for trespasses, crimes, injuries, extortions, contempts, and other misdemeanors whatsoever, howsoever imposed or inflicted, or to be imposed or inflicted for any matter, cause, or thing whatsoever in our said province of F——, and the territories depending thereon, and maritime parts of the same and thereto adjoining, in any Court of our Admiralty there held or to be held, presented or to be presented, assessed, brought forfeited, or adjudged; and also all amerciaments, issues, fines, perquisites, mulcts, and pecuniary punishments whatsoever, and forfeitures of all manner of recognisances, before you or your Lieutenant, Deputy or Deputies in our said province of F——, and the territories depending thereon, and maritime parts of the same and thereto adjacent whatsoever, happening or imposed, or to be imposed or inflicted, or by any means assessed, presented, forfeited, or adjudged, or howsoever by reason of the premises, due or to be due in that behalf to us, or to our heirs and successors.

And further to take all manner of recognisances, cautions, obligations, and stipulations, as well to our use, as at the instance of any parties, for agreements or debts, or other causes whatsoever, and to put the same into execution, and to cause and command them to be executed; and also to arrest, and cause and command to be arrested, according to the civil and maritime laws, and ancient customs of our

said Court, all ships, persons, things, goods, wares and merchandises, for the premises and every of them, and for other causes whatsoever concerning the same, wheresoever they shall be met with, or found throughout our said province of F——, and the territories depending thereon, and maritime parts thereof and thereto adjoining, as well within liberties and franchises as without; and likewise for all other agreements, causes, or debts, howsoever contracted or arising, so that the goods or persons may be found within our jurisdiction aforesaid.

And to hear, examine, discuss, and finally determine the same, with their emergencies, dependencies, incidents, annexed and connexed causes and businesses whatsoever; together with all other causes, civil and maritime, and complaints, contracts, and all and every the respective premises whatsoever above expressed, according to the laws and customs aforesaid, and by all other lawful ways, means, and methods, according to the best of your skill and knowledge.

And to compel all manner of persons in that behalf, as the case shall require, to appear and to answer, with power of using any temporal correction; and of inflicting any other penalty or mulct, according to the laws and customs aforesaid.

And to do and administer justice, according to the right order and cause of law, summarily and plainly, looking only into the truth of the facts.

And to fine, correct, punish, chastise, reform, and to imprison, and cause and command to be imprisoned in any gaols, being within our province of F—— aforesaid, and the territories depending thereon, the parties guilty, and the contemnors of the law and jurisdiction of our Admiralty aforesaid, and violators, usurpers, delinquents and contumacious absenters, masters of ships, mariners, rowers, fishermen, shipwrights, and other workmen and artificers whatsoever exercising any kind of maritime affairs, according to the rights, statutes, laws, and ordinances, and customs anciently

observed ; and to deliver and absolutely discharge, and cause and command to be discharged, whatsoever persons imprisoned in such cases, who are to be delivered.

And to preserve, or cause to be preserved, the public streams, ports, rivers, fresh waters and creeks whatsoever, within our maritime jurisdiction aforesaid, in what place soever they be in our province of F—— aforesaid, and the territories depending thereon, and maritime parts of the same and thereto adjacent whatsoever, as well for the preservation of our navy royal, and of the fleets and vessels of our kingdom and dominions aforesaid, as of whatsoever fishes increasing in the rivers and places aforesaid.

And also to keep, and cause to be executed and kept, in our said province of F——, and the territories depending thereon, and maritime parts thereof and thereto adjacent whatsoever, the rights, statutes, laws, ordinances and customs anciently observed.

And to do, exercise, expedite, and execute all and singular other things in the premises, and every of them, as they by right, and according to the laws and statutes, ordinances, and customs aforesaid should be done.

And moreover to reform nets too close, and other unlawful engines or instruments whatsoever for the catching of fishes wheresoever, by sea, or public streams, ports, rivers, fresh waters, or creeks whatsoever, throughout our province of F—— aforesaid, and the territories depending thereon, and maritime parts of the same and thereto adjacent, used or exercised, within our maritime jurisdiction aforesaid wheresoever.

And to punish and correct the exercisers and occupiers thereof, according to the statutes, laws, ordinances, and customs aforesaid.

And to pronounce, promulge, and interpose all manner of sentences and decrees, and to put the same in execution ; with cognisance and jurisdiction of whatsoever other causes, civil and maritime, which relate to the sea, or which any

manner of ways respect or concern the sea, or passage over the same, or naval or maritime voyages, or our said maritime jurisdiction, or the places or limits of our said Admiralty and cognisance aforementioned, and all other things done, or to be done.

With power also to proceed in the same, according to the statutes, laws, ordinances, and customs aforesaid, anciently used, as well of mere office mixed or promoted, as at the instance of any party, as the case shall require and seem convenient : and likewise with cognisance and decision of wreck of the sea, and of the death, drowning, and view of dead bodies of all persons howsoever killed or drowned, or murdered, or which shall happen to be killed, drowned, or murdered, or by any other means come to their death, in the sea, or public streams, ports, fresh waters, or creeks whatsoever, within the flowing of the sea and high water mark, throughout our aforesaid province of F——, and the territories depending thereon, and maritime parts of the same, and thereto adjacent, or elsewhere within our maritime jurisdiction aforesaid.

Together with the cognisance of Mayhem in the aforesaid places, within our maritime jurisdiction aforesaid, and flowing of the sea and water there happening ; with power also of punishing all delinquents in that kind, according to the exigencies of the law and customs aforesaid.

And to do, exercise, expedite, and execute all and singular other things, which in and about the premises only shall be necessary or thought meet, according to the rights, statutes, laws, ordinances, and customs aforesaid.

With power of deputing and surrogating in your place for the premises, one or more deputy or deputies, as often as you shall think fit ; and also with power from time to time of naming, appointing, ordaining, assigning, making, and constituting whatsoever other necessary, fit, and convenient officers and ministers under you, for the said office, and execution thereof in our said province of F——, and the terri-

tories depending thereon, and maritime parts of the same, and thereto adjacent whatsoever.

Saving always the right of our High Court of Admiralty of England, and also of the Judge and Register of the said Court, from whom or either of them, it is not our intention in any thing to derogate by these presents; and saving to every one who shall be wronged or grieved by any definitive sentence or interlocutory decree, which shall be given in the Vice Admiralty Court of our province of F—— aforesaid, and the territories depending thereon, the right of appealing to our aforesaid High Court of Admiralty of England.

Provided nevertheless, and under this express condition, that if you, the aforesaid A. B. our Captain General and Governor in Chief, shall not yearly, to wit, at the end of every year, between the feast of Saint Michael the Archangel and All Saints duly certify, and cause to be effectually certified (if you shall be thereunto required) to us, and our Lieutenant Official, Principals, and Commissary-General and Special, and Judge and President of the High Court of our Admiralty of England aforesaid, all that which from time to time, by virtue of these presents, you shall do and execute, collect, or receive in the premises, or any of them, together with your full and faithful account thereupon, to be made in an authentic form, and sealed with the Seal of our Office, remaining in your custody, that from thence, and after default therein, these our Letters Patent of the Office of Vice Admiralty aforesaid, as above granted, shall be null and void, and of no force or effect.

Further we do, in our name, command all and singular our Governors, Justices, Mayors, Sheriffs, Captains, Marshals, Bailiffs, Keepers of all our Goals and Prisons, Constables, and all other our Officers and faithful liege subjects whatsoever, and every of them, as well within liberties and franchises as without, that in and about the execution of the premises, and every of them, they be aiding, favouring, assisting, submissive, and yield obedience, in all things as is

fitting to you, the aforesaid A. B. our Captain-General and Governor in Chief of our province of F—— aforesaid, and to your Deputy whomsoever, and to all other Officers by you appointed, and to be appointed, of our said Vice Admiralty of F—— aforesaid, and the territories depending thereon, and maritime parts of the same, and thereto adjoining, under pain of the law, and the peril which will fall thereon.

Given at London, in the High Court of our Admiralty of England aforesaid, under the Great Seal thereof, &c.

1

2

3

II.

AN ADDRESS DELIVERED AT THE OPENING OF THE
LAW ACADEMY OF PHILADELPHIA, BEFORE THE
TRUSTEES AND MEMBERS OF THE SOCIETY FOR THE
PROMOTION OF LEGAL KNOWLEDGE. IN THE HALL OF
THE SUPREME COURT, ON WEDNESDAY, THE 21ST OF
FEBRUARY, 1821. BY PETER S. DUPONCEAU, LL. D.
PROVOST OF THE ACADEMY.

Mr. President. Gentlemen,

YOU are assembled for the purpose of witnessing and encouraging by your presence, the incipient efforts of the Law Academy of Philadelphia. Under your patronage we may indulge reasonable hopes of succeeding at least in the attainment of the primary object of its institution, which is no other than to stimulate the exertions of youth, towards acquiring an enlarged and liberal knowledge of the laws of our country. If this honest desire should alone be fulfilled, we shall not have laboured and you will not have bestowed your countenance and your support in vain. But our views extend much farther. We have conceived the ambitious hope of being able, with your powerful assistance, to raise from this humble seed a national school of jurisprudence, worthy of the high reputation which the Pennsylvania bench and bar have justly ac-

Z

quired ; we are convinced that it is in your power to raise our infant institution, by proper degrees, to this honourable rank, and make it gradually expand, until its beneficial influence shall be felt in the remotest parts of our union. This we believe you can do, because a national seminary of legal knowledge is absolutely wanted in this country; and cannot be much longer dispensed with; because the central situation of this city points it out as the fittest spot for such an establishment, and because there are talents here collected fully adequate to the important task.

And why should not this honourable design meet with success equal to our wishes? What are the mighty obstacles in its way, if we have but the fixed will and a firm determination to persevere in our undertaking? Look at that medical school, the pride of our city and the honour of our country! Look back to the time when it was first instituted, when the population of Philadelphia hardly amounted to twenty thousand souls, when there was but little communication between the thinly populated provinces of the British American Empire, and when it was still fashionable to believe that a regular education in any of the great branches of science could only be acquired in the schools of the mother country. How difficult, how impracticable, how extravagant, I may say, must not the plan have appeared to vulgar and to timid minds? But Shippen and Morgan and Rush, the illustrious founders of that noble institution, thought other-

wise. With eagle eyes they saw through the mists of futurity, they felt themselves carried along with their country in its rapid ascent imperceptible to minds of an ordinary stamp. They passed through the storms of the revolution, still looking forward to their great object, and two of them at least had the good fortune to live to see it accomplished. While this country shall remain alive to the feeling of national glory, while it shall continue to feel a pride in the memory of its illustrious citizens, the names of Shippen, Morgan and Rush shall be held in perpetual and grateful remembrance.

Had those great men desponded because of the small number of their scholars and the gloominess of their first prospects,* we should now have to lament our inertness, when we saw, perhaps, some rival city in possession of that jewel, which we had indeed the power but not the spirit to acquire. And we may lament it in the present instance, if we do not steadily pursue the plan that we have begun upon. For the idea has gone forth, the necessity of an institution of this kind is felt every where, and depend upon it, America will have a national school of jurisprudence, and will gladly patronize such an institution, whenever it will find it established upon a rational plan, and with a reasonable prospect of success.

It is true that we have no model for the institu-

* Dr. Rush used often to say in familiar conversation with his friends, that the Medical Professors of our University in the first years of its establishment had not "*salt to their porridge.*"

tion we contemplate in the country whence we have derived the system of common law under which we live. There, by what appears at first sight a strange anomaly, but which can nevertheless be satisfactorily explained, the civil law enjoys all the patronage of government, regular professorships for the instruction of youth in the principles of the Roman jurisprudence are established in the two great universities of Oxford and Cambridge, while the supreme law of the land appears to be neglected, and every attempt to raise seminaries for the education of its students has hitherto unaccountably failed. The Inns of Court formerly so celebrated, have gradually degenerated from what they once were, no points are now mooted there, no regular exercise imposed upon the students, no lectures delivered to them; in short no academical instruction is received within their walls, and those who wish to apply themselves with success to the study of the law, are obliged to resort to the aid of private teachers. The Inns of Court are become Inns in the literal sense of the word; lodgings and regular meals may be had there: but except that the students are allowed the use of a library, every instruction which the bare reading of those books cannot afford, must be sought for elsewhere. Even the examination of candidates for admission to the bar has become an empty formality. Nor has a better fate attended the celebrated chair which Mr. Viner's munificence established at the University of Oxford. The great Blackstone appeared

there as a bright meteor, and by a single course of lectures immortalised his name and rendered a signal benefit to the profession. He was followed by Mr. Wooddeson, *haud passibus æquis*, and since that time a dead silence has reigned in the hall where the commentaries were first read to an admiring audience. The Professorship has become a sinecure.

In a country so enlightened as England, where every branch of science is cultivated with unremit-
ted ardor and exemplary success, such a state of things cannot exist without some adequate cause, and we will most probably find it in the peculiar nature of their legal and judiciary institutions. The civil law is a science founded on principles, and its application to particular cases is the result of fair deductions from general rules and maxims. No decision of a Judge under such a system can be conclusive, in analogous cases, unless it be traced to the fountain of the law by clear logical inference. For the law is always paramount to the opinion of the Judges. It is evident therefore that academical instruction, is the only means through which a competent knowledge of the civil law can be acquired. The common law, on the contrary, rests on a different foundation. It is preserved as a sacred deposit, within the precincts of Westminster Hall, under the guardianship of twelve high priests, called Judges, who alone have the right to deliver its oracles. There you find no subordinate judiciary orders, until you come down to the most infe-

rior magistrates, whose jurisdiction is every way restricted and circumscribed and almost entirely confined to the trial of petty offences, or to what in other countries is called the administration of the *Police*,* while all civil matters and the cognisance of great crimes are exclusively reserved to the Supreme Judges, whose jurisdiction extends over the whole country. The law which they administer, with the exception of a few statutes, the construction of which still rests with themselves, consists entirely of a series of their own and their predecessors' decisions on particular cases. There is no appeal to the power of logic, or the supremacy of principles. Judicial opinions solemnly delivered, must not be impugned, for they are the law of the land, as much as if they had been enacted by the parliament with all the solemn forms of legislation. With a judiciary so constituted, it may be politic not to encourage academical schools of the national jurisprudence, lest ambitious professors and bold commentators should obtrude their private opinions, instil doubts into the minds of youth, and diminish the profound respect which the nation willingly pays to the responses of the Judges. And indeed the four great Courts sitting at Westminster Hall, are themselves schools of the highest kind, from whom the assiduous student may acquire all the knowledge that he wants in aid of his private studies. The opinions of the Judges given at full length as they have been since the days of Lord Mans-

* However this may be in theory, it is certainly so in practice.

field, with the reasons and authorities in support of each decision, are professional lectures from the best and purest source, which may well supersede the necessity of academical institutions, in a country so peculiarly constituted.

But when, on the other hand, we consider the complicated organisation of our own country, we find an immense difference between this order of things and that which exists in England. Here the common law has not and can never have, so long as our constitution subsists, such a sanctuary as is provided for it there, nor such a body of high priests entrusted with its exclusive guardianship. Nor is there here, as in that country, a sovereign legislature to whom alone it is permitted to lay her hand upon the ark, and make such alterations as may be required in a succession of ages. Our union, on the contrary, consists of twenty-three independent States, and a federal government with limited powers. Each State, with in a sphere that extends to all cases of ordinary legislation, has its own legislators and its own judiciary establishments, with a more or less graduated hierarchy, while England, as I have shewn, knows only the highest and the lowest grades. Turn your eyes where you will, and you will find no where that common elevated source, whence the oracles of law may be received and diffused through the land. The jurisdiction of the Supreme Court of the United States is limited to few objects, and their decisions are by no means in all cases consi-

dered paramount and obligatory on the State judiciaries. Twenty-four Supreme Courts, and an immense number of inferior ones, in various gradations, are daily issuing their often contradictory decrees, on points arising out of the law which is common to us all. I do not except Louisiana, where, though the common law has not been established by name, its most essential principles have been necessarily introduced, and are constantly acted upon. Each State, moreover, possesses an independent legislature, with almost unlimited powers to alter and new model the system of laws, a power which they have not sparingly exercised; so that the common law in its details has already suffered many considerable changes, and in process of time, unless speedy measures are taken to counteract or at least to direct that spirit of innovation which appears every where to prevail, will branch out into as many different systems as there are States in the union, in which the great features of the parent will at last in vain be sought for. Those who have attended to the subject, have easily observed in how many different ways the law has already been altered in the different States, under various customary and statutory modifications. But still it is the common law; it is still that law which stamps freedom and equality upon all who are subject to it, which protects and punishes with an equal hand the high and the low, the proud and the humble; it is that law, whose magical wand bursts open the prison doors, and delivers in an instant

the victims of arbitrary authority ; that law, which boasts of twelve invisible Judges, whom the eye of the corruptor cannot see, and the influence of the powerful cannot reach ; for they are no where to be found, until the moment when the balance of justice being placed in their hands, they hear, weigh, determine, pronounce, and immediately disappear, and are lost in the crowd of their fellow citizens. In short, it is that law, whose benefits we all have felt, whose protection we all enjoy, and which no description could so well represent to our minds as these two simple words, the "*common law*."

To preserve, at least, in their purity the essential parts of this admirable system ; to exhibit it constantly as a whole, in the eyes of the studious youth of these United States ; to instil its principles into the minds of those, who at some future day will be called to be the Judges and legislators of the land, and by that means to create an army of faithful sentinels, who will constantly watch over the sacred deposit in the States which they may inhabit ; to prevent rash innovations and inconsistent decisions in our numerous legislatures and Courts of judicature, and secure as much as possible an uniformity of jurisprudence in the land, is the great object which those who have projected this institution had in view, an object, which, it must be acknowledged, is of the highest importance to our country, and which we are satisfied, cannot be obtained by any other means.

In fact, what other method could be proposed

A a

under the circumstances that I have described to preserve the purity of the law in our extensive country? Are we to wait for every spring and autumn ship from England, for cargoes of decisions of the Courts of Westminster Hall? This would be derogatory to our national independence; and some States, among which is our own, have already shewn their sense of this proceeding, by prohibiting the reading in our Courts of modern English adjudications. Are we to refer exclusively to that mass of decisions which daily issue in the form of Reports from the presses of the different States? But those decisions are often contradictory, and probably will become more so, unless there is a central point where those divergent rays may be collected and whence they may be diffused with additional light over the surface of the union. Or is each State to consider the decisions of its own judiciary as the only pure sources of law, or are the Judges to select at random from the English and American reporters, the doctrines that may best suit their momentary fancy? Any one of these methods will be sure to plunge us into a chaos, whence we shall never emerge, until some Justinian or Napoleon shall, sword in hand, establish uniformity by a code which will bear his name.

The only sure preservative against these threatened evils is the establishment of a national school of jurisprudence at some central point of the United States. It is through the minds of rising generations that the vast body of American citizens can

be most effectually acted upon. With a succession of able professors the genuine spirit of our law may be preserved through a series of ages ; legislative innovations, if not prevented, may be directed into a proper channel, and uniformity in judicial decisions may be in a great degree, if not entirely, secured. The common law, by the mere force of circumstances, is becoming more and more, in England as well as here, but more particularly in this country, a science of principles, which appears from the great number of elementary books that have lately been published, in which a more luminous order, a more regular method, and a greater freedom of opinion display themselves than were formerly met with in works of this description. The immense increase of bulky reports which has lately taken place and does not seem likely to diminish, will at last drive the student in despair to compilations and the works of private jurists, and thus will most probably be subverted the ancient basis of the jurisprudence of England, and that system of judiciary legislation which has been preserved there for so many ages.

If things should take this course, it may perhaps be wise in the English nation, at no very remote period, to establish law schools for themselves. But with this we have no concern. It is enough that the necessity of such an establishment in this country has been clearly, and I hope satisfactorily pointed out to you.

While the organisation of our judiciary renders

it impossible to pursue the antischolastic system which England has hitherto followed ; on the other hand it is free from the obstacles which would render our plan, in its full extent, absolutely impracticable in that country. There the civil law, which, though subordinate, is still a part of their general system, is exclusively studied, administered, and practised by a different body of men, from the professors of the common law. Hence have arisen jealousies and feuds between the civilians and common lawyers which are not entirely composed to this day. The two professions are strangers and in a manner hostile to each other. The common lawyer looks down upon the civil law with a mixed feeling of contempt and dislike,* while the civilian, proud of the protection of his government and of the superior elegance of Justinian's code, smiles at what he calls the barbarous jargon of Westminster Hall. Yet those two systems, though different in many respects, assimilate more than is generally

* The source of this feeling lies deep in the history of the country. The efforts which were made in former times to introduce the civil law into England, were with a view to destroy the liberties of that nation. The attachment of the clergy to the Roman code was not so much on account of its admirable theory of contracts, as of the imperial texts in favour of the unlimited authority of church and king, and the administration of justice without a jury. on the models of the Star Chamber and High Commission Courts, which plainly shewed what would have been the judicial organisation of the kingdom, if their doctrines had prevailed. Nor can we blame the English nation for entertaining the same jealousy even at the present day, when we consider the tendency of monarchical governments to arbitrary power. In this republican country, no such danger is to be dreaded, and our common lawyers may become acquainted with the civil law, and profit by its knowledge, without any fear of the introduction of monarchical principles, or of the *torture* being preferred to *trial by jury*.

believed, and at any rate they are both, as they respectively apply, constituent parts of the general jurisprudence of the land. We have in this respect an immense advantage over the English nation: the administration of the civil and the common law is committed to the same Judges; and the same body of jurists is called upon to practise both. Hence it becomes necessary to our practitioners to become acquainted with the two codes, by which means the law will become in their hands a more expanded and more liberal science. The fruits of the study of the civil law, which has lately become fashionable among us, are already to be perceived in erudite works of jurisprudence, and in the able decisions of federal and State Judges who have shewn by their examples what advantages may be derived from an acquaintance with that beautiful system of moral philosophy applied to human affairs.

The common law, the civil law,* the law commercial and maritime, the law of nature and nations, the constitutional and federal law of our country, and the jurisprudence of the different States, form together the aggregate of the great body of American law. It is impossible that such a vast,

* As far as it is a part of our legal system; for there ought to be a selection of those titles that are proper to be taught in our schools of jurisprudence and the rest, if studied at all, should only be considered as a matter of mere curiosity. For this reason, it is suggested that a re-publication of those parts of the English translation of Domat's Civil Law, which are of real use, and are not in opposition to our national institutions, would be found of great advantage to the profession. It might be comprised in one octavo volume.

such a diversified field of knowledge can be well or successfully cultivated without the aid of academical instruction. Therefore we may hope in time, if success attends this institution, to see its chairs filled with professors of each of these branches of our noble science.

Ever since the establishment of the federal constitution, the necessity of academical instruction for the students of the law has been felt throughout the United States. It was not long after that memorable epoch, that the late Judge Wilson gave his celebrated lectures, which if he had continued, would have laid an excellent foundation for the edifice that we are now endeavouring to raise. Untoward circumstances prevented him from longer giving way to the zeal by which he was animated, and the country will long lament that as a professor he was only shewn to the legal world. *Fata eum tantum ostenderunt.*

The exertions of Judge Reeves were remarkably successful in establishing in Connecticut a respectable law school, consisting of students from all parts of the union. This is a proof of the eagerness with which the country is disposed to support and patronise similar institutions. But we are informed that Judge Reeves has given up his professorship, and that it has fallen into other hands, with what success we know not.

In the university of Cambridge, in the State of Massachusetts, there is a law chair established,

where lectures are regularly delivered by two professors of eminent knowledge and talents,* but not on different branches of the law. If that justly celebrated seminary were situated elsewhere than in one of the most remote parts of our union, there would be no need, perhaps, of looking to this city for the completion of the object which we have in view. Their own sagacity would suggest to them the necessity of appointing additional professors for each important branch of our legal system, and thus under their hands would gradually rise a noble temple dedicated to the study of our national jurisprudence. But their local situation, and that alone, precludes every such hope; for otherwise the world well knows that they are neither wanting in inclination or ability to pursue any great object that may redound to their fame and the benefit of their country.

Not long since, our fellow-citizen Charles W. Hare, deeply impressed with a strong sense of the necessity of regular legal instruction, and moved by motives of the purest patriotism, accepted the appointment of law professor in the university of this State, which had been vacant since the resignation of Judge Wilson, and gave a course of gratuitous lectures, in which he displayed those brilliant talents with which nature and a refined education have endowed him. Unfortunately for us, his private affairs called him to another part of the world,

* The Honourable Chief Justice Parker and the Honourable Asahel Stearns.

and thus was his useful career at least interrupted. By these examples we see that the most eminent talents have been successively exerted in these United States to attain that great object which the country imperiously calls for, which must at some day or other be carried into execution, and the honour of effecting which courts your acceptance. In time, when this institution shall have attained a sufficient degree of maturity, it may be annexed to the University of Pennsylvania, and shine there by the side of our celebrated medical school; but the first efforts must be made by the profession, and our infant academy must be reared under its wings, until it shall be worthy of being presented to our alma mater, who, I am convinced, will be disposed, in the mean time, to afford us all the aid in her power.

If I have succeeded in convincing you, gentlemen, not only of the importance, but of the necessity of this institution, I may indulge a hope that you will be disposed to support it with your patronage.* Feeble as it may at present appear, if you are but disposed to encourage it, it will rise with gigantic steps, and in the end realise the fondest hopes of its patriotic founders. It originated with a society of young students, who weekly met together under the denomination of a Law Society for the discussion of legal questions. Societies of this description have long existed in London among the students in the Temple; but their object has been

* The bar of Philadelphia was present by invitation.

rather to exercise themselves in public speaking than to increase their knowledge of jurisprudence. For it is but little, after all, that unpractised scholars can communicate to each other. Similar societies have been established in this city from time to time ; but none of them have been able to boast of long duration. At last, a number of young gentlemen met together last autumn for the same purpose, sensible of the inefficacy of similar associations for the purpose of solid learning, fell upon the idea of engaging an elder barrister to preside at their meetings and direct their exercises. Being honoured with an application from this society to accept the office of their president, it struck me at once that upon this foundation a school of jurisprudence might be raised, which, if successfully and and firmly established, would redound to the honour of the State and the permanent advantage of the country. I therefore accepted their invitation, and communicated to them the object I had in view, which I had the pleasure to find not only met with their approbation, but excited their warmest zeal, which was displayed in their efforts to carry it into effect. A committee was appointed from their body, with whom I consulted for several weeks, and when our plan was considerably matured, we associated to ourselves a few members of the bar, with whom, after much consultation, the project was settled, which has been since carried into execution. It was agreed to form a society of such members of the profession as should be inclined to

join it, and that the law society, erected into a law academy, should be annexed to it, and subjected to regular discipline under a provost and vice-provost, and a board of trustees elected by the society, which was to be styled "The Society for the promotion of Legal Knowledge and Forensic Eloquence." Success has hitherto answered our most sanguine expectations. The honourable Judges and a considerable number of the members of the bar have joined our association. It was thought proper, to avoid delay, to name at once the officers of the Society, until the month of May next, when a general election shall take place. A charter of incorporation was obtained, which, with our constitution, has been published in one of the newspapers of this city. On the part of the young gentlemen who composed the law society, not only no obstacle was thrown in our way, but, with an alacrity and zeal that does them the greatest honour, they unanimously agreed to surrender their independence at the shrine of science, and to submit to academical discipline for the sake of promoting their improvement in knowledge. On the first invitation, they, without hesitation, formed themselves into a Law Academy to be annexed to our Society, agreeably to the provisions of its institution. It is to be remarked that the Law Society was not entirely composed of young students, but that several of them had been called to the bar, and desired to remain members of the Academy, for the encouragement of their junior brethren. Although but a few

weeks have elapsed since this academy has been established, I have the pleasure to state that it has received and is receiving a constant accession of members. We have every reason to expect that its numbers, already considerable,* will continue to increase.

The youth of the United States are peculiarly adapted to receive instruction and profit by it. They are sensible, intelligent, have quick perceptions, and are exemplarily docile and tractable. The medical school of this city offers a striking example of their thirst after knowledge, and the able physicians that it has produced are proofs of their talents and capacity for learning. With such a foundation, hardly any plan for an academical establishment will appear extravagant. Give our youth but free access to the temple of science, and you will see them flock to it in such numbers as will astonish you. On this expectation, and the hopes of your patronage, this institution has been raised. Give it but reasonable encouragement, and you will wonder at the work of your own hands.

The means which are to produce these great efforts are very simple. Small as are the contributions required of the members of the Society for

* There were at the time thirty regular and eighteen honorary members; the latter attending the exercises occasionally, but without being liable to fines for non-attendance. (Since that time, the number of the students of the academy has increased and is increasing. Professor BARNES reads lectures on the Common and Statute laws of Pennsylvania to the general satisfaction of his hearers.)

the promotion of legal Knowledge, yet their aggregate is of infinite importance in the infancy of this establishment. It is therefore to be wished that all the members of our profession should come into this association, so that the academy should derive from it not only the benefit of a trifling pecuniary aid, but the more important one of their support and countenance. The students of law should also be induced to become fellows of the academy, for on its increase depends the success of the institution, which, as its numbers augment will at first be able to support, and at last gradually to raise itself to the contemplated height of greatness and prosperity.

At present its resources for instruction rest on the exertions of the provost and vice-provost. The former exercises of the Law Society are continued; the students once in every week discuss a legal question before the presiding member of the faculty, who at the next meeting delivers to them his opinion, not in the form of a judicial decision, but of a law lecture on the particular subject to which the question refers. It is, moreover, contemplated to require of the members readings or dissertations on various points of law. Here we have already all the exercises that ever were in use in the English Inns of Court, the mootings of points and the law readings; and if our academy in its infancy offers the same means of instruction that that celebrated university, as Fortescue and Lord Coke style it, ever did in its best days, it is worth the stu-

dent's while to attend it. But there is every reason to hope that we shall in time be able to add the lectures of regular professors;* for it is evident, that as our academicians increase in numbers, they will more and more acquire the capacity to support their own establishment. In the mean time, it is much to be wished, that those gentlemen of the profession, who unite capacity and leisure, would now and then condescend to deliver to the academy occasional lectures on topics of their own choice, remembering on what slender foundation our medical school was first established, and the success which followed the zeal and perseverance of its founders.

It is only by united efforts that any important design can be brought to a successful issue. We have the happiness to number among the patrons of this institution all the honourable Judges of the Supreme Court of this State, several of those of the inferior Courts, and a considerable portion of the members of our bar. The plan having been conceived by a few, and hurried in its execution, in order not to lose the opportunity of obtaining a charter of incorporation from the Court which was then sitting, it has been impossible to consult many of our respectable brethren whose advice we would with pleasure have availed ourselves of. We hope, however, that the opportunity we have missed is not lost, and that the more general aid and support of the profession will not be wanting to an in-

* See the note to p. 187.

stitution which has for its object the promotion of the legal science, and the honour of those who profess it.

Gentlemen of the Law Academy,

I turn to you with pleasure, as the pillars on which our institution rests. You are the corner-stones of the edifice; with your zealous co-operation every hope may be indulged; without it every endeavour of the venerable patrons of the establishment must fail; for it is in vain to support those who will not support themselves. Continue, therefore, to show yourselves worthy of the honour of being considered as the founders of a national law school in the United States. Pursue your studies with increased diligence, that the academy may one day point to you with pride and say, "these were our pupils." Endeavour to increase your numbers by persuasion and by example; for that is the foundation on which we must build, and remember that every additional student who now joins the academy, is a new and important pledge of its future success. Be not deterred by the fears of the weak or timid, but persevere with steady courage in the work that you have begun, and may the Great Legislator of the universe bless and direct our endeavours to promote a science which, under the revelations of his divine will, is the surest guide to lead mankind into the ways of justice and righteousness.

APPENDIX.



APPENDIX.

I.

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

The Constitution framed for the United States of America, by a Convention of Deputies from the States of New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, at a Session begun May 25, and ended September 17, 1787.

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION I.

All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

C c

SECTION. II.

1. The house of representatives shall be composed of members chosen every second year, by the people of the several States : and the electors in each State, shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative, who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States ; and who shall not when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned, among the several States which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand : but each State shall have at least one representative : and, until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three ; Massachusetts eight ; Rhode Island and Providence plantations one ; Connecticut five ; New York six ; New Jersey four ; Pennsylvania eight ; Delaware one ; Maryland six ; Virginia ten ; North Carolina five ; South Carolina five ; and Georgia three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The house of representatives shall choose their speaker and other officers ; and shall have the sole power of impeachment.

SECTION III.

1. The senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof for six years : and each senator shall have one vote.

2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year ; of the second class, at the expiration of the fourth year ; and of the third class, at the expiration of the sixth year : so that one third may be chosen every second year. And if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator, who shall not have attained to the age of thirty years, and been nine years a citizen of the United States ; and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The vice-president of the United States shall be president of the senate but shall have no vote unless they be equally divided.

5. The senate shall choose their other officers, and also a president pro tempore, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside : and no person shall be convicted, without the concurrence of two-thirds of the members present.

7. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or, under the

United States ; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

SECTION IV.

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof ; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members ; and a majority of each shall constitute a quorum to do business ; but a smaller number may adjourn from day to day, and may be authorised to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy ; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same ; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased, during such time ; and no person having any office under the United States shall be a member of either house during his continuance in office.

SECTION VII.

1. All bills for raising revenue shall originate in the house of representatives ; but the senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States ; if he approve, he shall sign it ; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been

presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary, (except on a question of adjournment,) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.
2. To borrow money on the credit of the United States.
3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.
4. To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcies throughout the United States.
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.
6. To provide for the punishment of counterfeiting the securities and current coin of the United States.
7. To establish post offices and post roads.
8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.
9. To constitute tribunals inferior to the supreme court.
10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies : but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.

16. To provide for organising, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. And,

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.

1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or ex post facto law, shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another : nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law : and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States ; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatsoever, from any king, prince, or foreign state.

SECTION X.

1. No State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make any thing but gold and silver coin a tender in payment of debts ; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts ; or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign

power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows :

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress ; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed ; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president ; and if no person have a majority, then, from the five highest on the list the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by States, the representation from each

D d

State having one vote ; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors, shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

5. No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president ; neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation :

“ I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States.”

SECTION II.

1. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices : and he shall have power to grant reprieves and pardons, for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur : and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts, of law, or in the heads of departments.

3. The president shall have power to fill up all vacancies that may happen, during the recess of the senate, by granting commissions, which shall expire at the end of the their next session.

SECTION III.

He shall, from time to time, give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses or either of them ; and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers

He shall take care that the laws be faithfully executed ; and shall commission all the officers of the United States.

SECTION IV.

The president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour ; and shall at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION. II.

1. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers, and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party : to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2 In all cases, affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party,

the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the State where the said crimes shall have been committed ; but when not committed within any State, the trial shall be at such place or places, as the Congress may by law have directed.

SECTION III.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason ; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION I.

Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.

SECTION II.

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or

other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labour in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour; but shall be delivered up on claim of the party to whom such service or labour may be due.

SECTION III.

1. New States may be admitted by the Congress into this union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States, concerned, as well as of the Congress.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION IV.

The United States shall guarantee to every State in this union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

ARTICLE V.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution; or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to

all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress ; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article : and that no State, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

2. This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land : and the judges, in every State shall be bound thereby ; any thing in the constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this constitution : but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the convention of nine States shall be sufficient for the establishment of this constitution between the States so ratifying the same.

Done in convention, &c.

AMENDMENTS.

The following articles in addition to, and amendment of, the Constitution of the United States, having been ratified by the legislatures of nine States, are equally obligatory with the Constitution itself.

ARTICLE I.

After the first enumeration required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons.

ARTICLE II.

No law varying the compensation for the services of the senators and representatives shall take effect, until an election of representatives shall have intervened.

ARTICLE III.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE IV.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE V.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner ; nor in time of war, but in a manner to be prescribed by law.

ARTICLE VI.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE VII.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger : nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself ; nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use, without just compensation.

ARTICLE VIII.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district, wherein the crime shall have been committed ; which district shall have been previously ascertained by law ; and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favour ; and to have the assistance of counsel for his defence.

ARTICLE IX.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ; and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE X.

Excessive bail shall not be required ; nor excessive fines imposed ; nor cruel and unusual punishments inflicted.

ARTICLE XI.

The enumeration, in the constitution of certain rights, shall not be construed to deny or disparage others, retained by the people.

ARTICLE XII.

The powers, not delegated to the United States by the the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XIII.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XIV.

The electors shall meet in their respective States, and vote by ballot for president and vice-president, one of whom at least shall not be an inhabitant of the same State with themselves ; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president ; and they shall make distinct lists of all persons voted for as president, and of all persons voted for

as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

The person having the greatest number of votes as vice-president, shall be vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.



II.

(EXTRACT.)

THE UNITED STATES v. WORRALL.

In the Circuit Court of the United States for the Pennsylvania District.

APRIL SESSIONS, 1798.

Present CHASE and PETERS, Justices.

(2 Dallas, 384.)

The defendant was charged with an attempt to bribe *Tench Coxe*, the Commissioner of the Revenue, and the indictment, containing two counts, set forth the case as follows : (*Here follows the indictment at large, with a statement of the evidence and the arguments of counsel on some incidental points which arose on the trial.*)

Verdict—Guilty on both counts of the indictment.

Dallas, (who had declined speaking on the facts before the jury) now moved in arrest of judgment, alleging that the Circuit Court could not take cognisance of the crime charged in the indictment. He premised, that, independent of the general question of jurisdiction, the indictment was exceptionable, in as much as it recited the act of Congress, making it the duty of the Secretary of the Treasury to form the contracts contemplated, but did not state the authority for devolving that duty on the Commissioner of the Revenue ; and, consequently, it could not be inferred, that the corrupt offer was made to seduce the Commissioner from the faithful execution of an *official public trust*, which was the gist of the prosecution. But, he contended, that the force of the objection to the jurisdiction, superseded the necessity of attending to matters of technical form and precision, in pre-

senting the accusation. It will be admitted, that all the judicial authority of the Federal Courts, must be derived, either from the Constitution of the United States, or from the Acts of Congress made in pursuance of that Constitution. It is, therefore, incumbent upon the prosecutor to shew, that an offer to bribe the Commissioner of the Revenue is a violation of some constitutional or legislative prohibition. The Constitution contains *express provisions* in certain cases which are designated by a definition of the crimes ; by a reference to the characters of the parties offending ; or by the exclusive jurisdiction of the place where the offences were perpetrated : but the crime of attempting to bribe, the character of a federal officer, and the place where the present offence was committed, do not form any part of the *constitutional express provisions*, for the exercise of judicial authority in the Courts of the Union. The judicial power, however, extends, not only to all cases, in law and equity, arising under the Constitution, but, likewise, to all such as shall arise under the laws of the United States, (*art. 3. s. 2.*) and besides the authority, specially vested in Congress, to pass laws for enumerated purposes, there is a general authority given "to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States, or in any department or office thereof." (*art. 1. s. 8.*) Whenever then, Congress think any provision necessary to effectuate the constitutional power of the government, they may establish it by law ; and whenever it is so established, a violation of its sanctions will come with the jurisdiction of this Court, under the 11th section of the Judicial Act, which declares, that the Circuit Court "shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States," &c. 1 *Vol. Swift's edit. p. 55.* Thus, Congress have provided by law, for the punishment of treason, misprision of treason, piracy, counterfeiting any public certificate, stealing or falsifying records, &c.; for the

punishment of various crimes, when committed within the limits of the exclusive jurisdiction of the United States; and for the punishment of bribery itself in the case of a Judge, an officer of the Customs, or an officer of the Excise. 1 *Vol. Swift's edit* p. 100. *Ibid.* p. 236, s. 66. *Ibid.* p. 327. s. 47. But in the case of the Commissioner of the Revenue, the Act constituting the office does not create or declare the offence, 2 *Vol.* p. 112, s. 6.; it is not recognised in the Act under which proposals for building the Light-house were invited, 3 *Vol.* p. 63; and there is no other Act that has the slightest relation to the subject.

Can the offence, then be said to arise under the Constitution, or the laws of the United States? And, if not, what is there to render it cognisable under the authority of the United States? A case arising under a law, must mean a case depending on the exposition of a law, in respect to something which the law prohibits, or enjoins. There is no characteristic of that kind in the present instance. But it may be suggested, that the office being established by a law of the United States, it is an incident naturally attached to the authority of the United States, to guard the officer against the approaches of corruption, in the execution of his public trust. It is true, that the person who accepts an office may be supposed to enter into a compact to be answerable to the government which he serves for any violation of his duty; and, having taken the oath of office, he would unquestionably be liable, in such case, to a prosecution for perjury in the Federal Courts. But because one man, by his own act, renders himself amenable to a particular jurisdiction, shall another man, who has not incurred a similar obligation, be implicated? If, in other words, it is sufficient to vest a jurisdiction in this Court, that a federal officer is concerned; if it is a sufficient proof of a case arising under a law of the United States to affect other persons, that such officer is bound, by law, to discharge, his duty with fidelity;—a source of jurisdiction is opened, which must inevitably overflow and destroy all the barriers between the judicial

authorities of the State and the general government. Any thing which can prevent a federal officer from the punctual, as well as from an impartial, performance of his duty ; an assault and battery ; or the recovery of a debt, as well as the offer of a bribe ; may be made a foundation of the jurisdiction of this Court ; and, considering the constant disposition of power to extend the sphere of its influence, fictions will be resorted to, when real cases cease to occur. A mere fiction, that the defendant is in the custody of the marshal, has rendered the jurisdiction of the *King's Bench* universal in all personal actions. Another fiction, which states the plaintiff to be a debtor of the Crown gives cognisance of all kinds of personal suits to the *Exchequer* : And the mere profession of an attorney attaches the privilege of suing and being sued in his own Court. If, therefore, the disposition to amplify the jurisdiction of the Circuit Court exists, precedents of the means to do so are not wanting ; and it may hereafter be sufficient to suggest, that the party is a federal officer, in order to enable this Court to try every species of crime, and to sustain every description of action.

But another ground may, perhaps, be taken to vindicate the present claim of jurisdiction : it may be urged, that though the offence is not specified in the Constitution, nor defined in any act of Congress ; yet, that it is an offence at common law, and that the common law is the law of the *United States*, in cases that arise under their authority. The nature of our Federal compact, will not, however, tolerate this doctrine. The 12th article of the amendment, stipulates, that "the powers not delegated to the *United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." In relation to crimes and punishments, the objects of the delegated power of the *United States* are enumerated and fixed. Congress may provide for the punishment of counterfeiting the securities and current coin of the *United States* ; and may define and punish piracies and felonies committed on the high seas, and offences against the law

of nations. *Art. 1. s. 8.* And, so, likewise Congress may make all laws which shall be necessary and proper for carrying into execution the powers of the general government. But here is no reference to a common law authority: Every power is matter of definite and positive grant; and the very powers that are granted cannot take effect until they are exercised through the medium of a law. Congress had undoubtedly a power to make a law, which should render it criminal to offer a bribe to the Commissioner of the Revenue; but not having made the law, the crime is not recognised by the Federal Code, constitutional or legislative; and, consequently, it is not a subject on which the judicial authority of the Union can operate.

The cases that have occurred, since the establishment of the Federal Constitution, confirm these general principles. The indictment against *Henfield*, an *American* citizen, for enlisting and serving on board a *French* privateer, while she captured a Dutch merchant ship, &c. expressly charged the defendant with a violation of the treaties existing between the *United States* and the *United Netherlands, Great Britain, &c.* which is a matter cognisable under the Federal authority by the very words of the Constitution. The jurisdiction in the indictment against *Ravara*, was sustained by reason of the defendant's official character as consul.* And in a recent prosecution by the State of Pennsylvania against *Shaffer*, in the Mayor's Court of Philadelphia, a motion in arrest of judgment was over-ruled by the Recorder (Mr. *Wilcocks*) though the offence consisted in forging claims to Land-Warrants, issuable under the resolution of Congress; and although the cognisance of all crimes and offences, cognisable under the authority of the United States, is exclusively vested in the District and Circuit Courts.†

Rawle (the Attorney of the District) observed, that the exception, taken in support of the motion in arrest of judgment, struck at the root of the whole system of the national

* 2 *Dallas*, 97.

† 4 *Dallas*, Append. xxxi.

government ; for if opposition to the pure, regular, and efficient administration of its affairs, could thus be made by fraud, the experiment of force might next be applied ; and doubtless with equal impunity and success. He concluded, however, that it was unnecessary to reason from the inconvenience and mischief of the exception ; for, the offence was strictly within the very terms of the Constitution, arising under the laws of the United States. If no such office had been created by the laws of the United States, no attempt to corrupt such an officer could have been made ; and it is unreasonable to insist, that merely because a law has not prescribed an express appropriate punishment for the offence, that, therefore, the offence, when committed, shall not be punished by the Circuit Court, upon the principles of common law punishment. The effect, indeed, of the position is still more injurious ; for, unless this offence is punishable in the Federal Courts, it certainly is not cognisable before any State tribunal. The true point of view for considering the case, may be ascertained, by an inquiry, whether, if Mr. Coxe had accepted the bribe, and betrayed his trust, he would not have been indictable in the Courts of the United States ? If he would be so indictable, upon the strongest principles of analogy, the offence of the person who tempted him, must be equally the subject of animadversion before the same judicial authority. The precedents cited by the defendant's counsel, are distinguishable from the present indictment. The prosecution against *Henfield* was not expressly on the treaty, but on the law of nations, which is a part of the common law of the United States ; and the power of indicting for a breach of treaty, not expressly providing the means of enforcing performance in the particular instance, is itself a common law power. Unless the judicial system of the United States justified a recourse to common law against an individual guilty of a breach of treaty, the offence, where no specific penalty was to be found in the treaty would, therefore, remain unpunished. So, likewise, with respect to *Ravara*, although he held the office of a consul, he

was indicted and punished at the common law. The offence charged in *Respublica v. Shaffer*, did not arise under the laws of the *United States*; but was simply the forgery of the names of private citizens, in order to defraud them of their rights; and even as far as the forgery might be supposed to deceive the public officers, it was a deception in regard to a mere official arrangement, for ascertaining transfers of donation claims, and not in regard to any act directed by law to be performed. But a further distinction presents itself. The donations to the soldiers were founded upon resolutions of the *United States* in Congress, passed long before the adoption of the present Constitution. The Courts of the several States, therefore, held a jurisdiction of the offence, which, without positive words or necessary implication, was not to be divested. The case did not come within the expressions in the Constitution, "cases arising under the Constitution and laws of the *United States*," &c. nor has it been expressly provided for by any act under the present Constitution. The criminal jurisdiction of the Circuit Court, which, wherever it exists, must be exclusive of State jurisdiction, cannot, perhaps, fairly be held to operate retrospectively, by withdrawing from the State judicatures powers they held, and duties they performed, previously to the Constitution, from which the Circuit Court derived its birth.

CHASE, *Justice*. Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject: The indictment cannot be maintained in this Court.

Rawle, answering in the affirmative, CHASE, *Justice*, stopped M. Levy, who was about to reply, in support of the motion in arrest of judgment; and delivered an opinion to the following effect.

CHASE, *Justice*. This is an indictment for an offence highly injurious to morals, and deserving the severest punishment; but, as it is an indictment at common law, I dis-

miss at once every thing that has been said about the Constitution and laws of the *United States*.

In this country, every man sustains a two-fold political capacity; one in relation to the State, and another in relation to the *United States*. In relation to the State, he is subject to various municipal regulations, founded upon the State constitution and policy, which do not affect him in his relation to the *United States*: For, the Constitution of the Union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases which the 8th section of the first article designates, there is a power granted to Congress to create, define, and punish, crimes and offences, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the government; and although bribery is not among the crimes and offences specifically mentioned, it is certainly included in this general provision. The question, however, does not arise about the power, but about the exercise of the power:—Whether the Courts of the *United States* can punish a man for any act, before it is declared by a law of the *United States* to be criminal? Now, it appears to my mind, to be as essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction.

It is attempted, however, to supply the silence of the Constitution and Statutes of the Union, by resorting to the common law, for a definition and punishment of the offence which has been committed: But, in my opinion, the *United States*, as a Federal government, have no common law; and, consequently, no indictment can be maintained in their Courts, for offences merely at the common law. If, indeed, the *United States* can be supposed, for a moment, to have a

common law, it must, I presume, be that of *England*; and, yet, it is impossible to trace when, or how, the system was adopted, or introduced. With respect to the individual States, the difficulty does not occur. When the *American* colonies were first settled by our ancestors, it was held, as well by the settlers, as by the Judges and lawyers of *England*, that they brought hither, as a birth-right and inheritance, so much of the common law, as was applicable to their local situation, and change of circumstances. But each colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different States, will soon discover, that the whole of the common law of *England* has been nowhere introduced; that some States have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one State, is not the common law of another; but the common law of *England*, is the law of each State, so far as each State has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a Federal or State Court.

But the question recurs, when and how have the Courts of the *United States* acquired a common law jurisdiction, in criminal cases? The *United States* must possess the common law themselves, before they can communicate it to their judicial agents: Now, the *United States* did not bring it with them from *England*; the Constitution does not create it; and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in *England*; or modified as it exists in some of the States; and of the various modifica-

tions, which are we to select, the system of *Georgia* or *New Hampshire*, of *Pennsylvania* or *Connecticut* ?

Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the government of the *United States*, which is a government in other respects also of a limited jurisdiction ; but Judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offence is at this time cognisable in a State Court ; but, certainly, Congress might have provided, by law, for the present case, as they have provided for other cases, of a similar nature : and yet if Congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

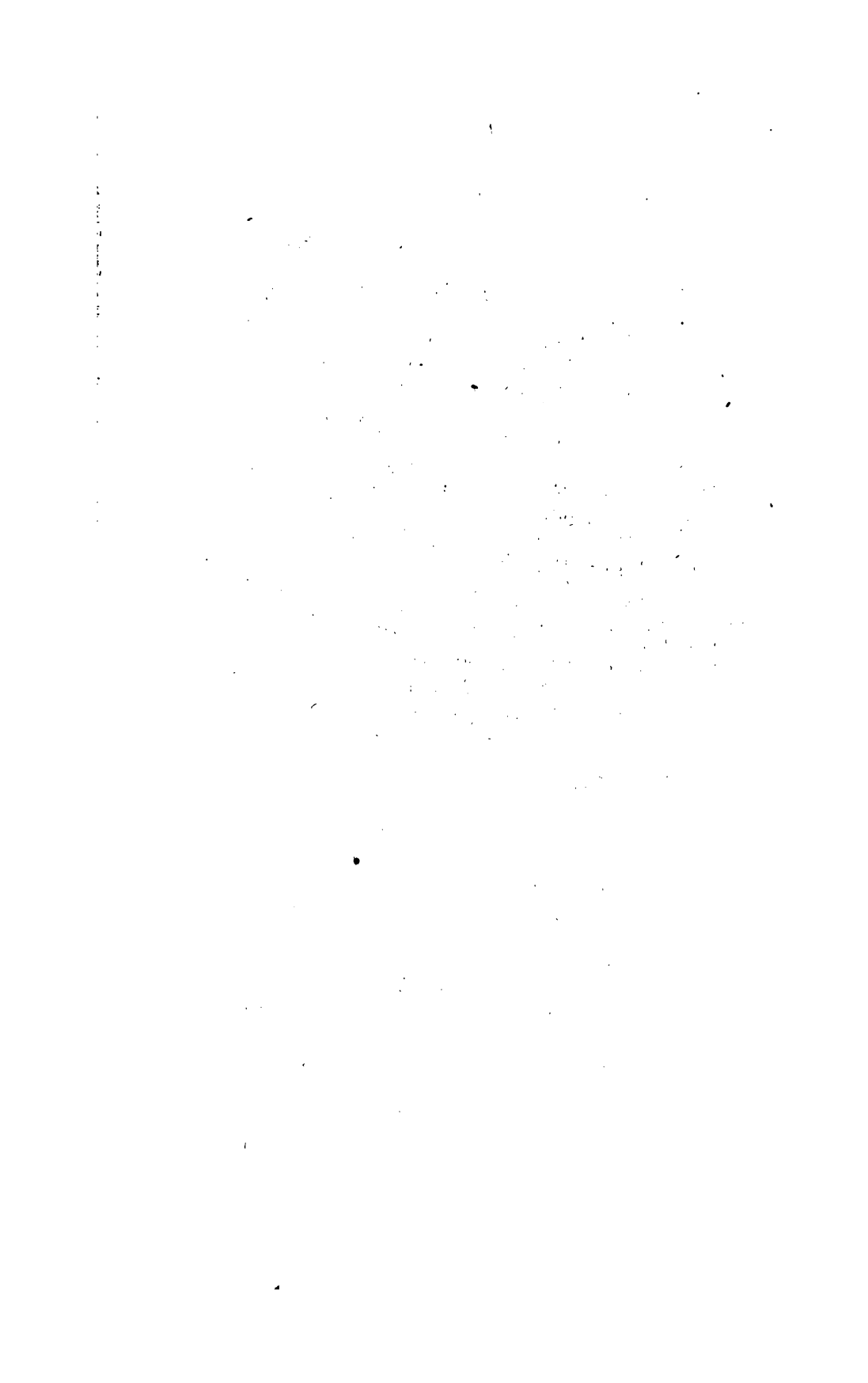
PETERS, Justice. Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary, and an inseparable, concomitant. But the existence of the Federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the State tribunals, or the offenders must escape with absolute impunity.

The power to punish misdemeanors, is originally and strictly a common law power ; of which, I think, the *United States* are constitutionally possessed. It might have been exercised by Congress in the form of a legislative act ; but, it may, also, in my opinion be enforced in a course of judicial proceeding. Whenever an offence aims at the subversion of any Federal institution, or at the corruption of its public officers, it is an offence against the well being of the *United States* ; from its very nature, it is cognisable under their authority ; and consequently, it is within the juris-

diction of this Court, by virtue of the 11th section of the judicial act.

The Court being divided in opinion, it became a doubt, whether sentence could be pronounced upon the defendant; and a wish was expressed by the Judges and the attorney of the district, that the case might be put into such a form, as would admit of obtaining the ultimate decision of the Supreme Court, upon the important principle of the discussion: But the counsel for the prisoner did not think themselves authorised to enter into a compromise of that nature. The Court, after a short consultation, and declaring, that the sentence was mitigated in consideration of the defendants circumstances, proceeded to adjudge,

That the defendant be imprisoned for three months ; that he pay a fine of 200 dollars ; and that he stand committed, till this sentence be complied with, and the costs of prosecution paid.



III.

INSTRUCTION

FROM THE GENERAL ASSEMBLY OF VIRGINIA TO THE SENATORS FROM THAT STATE IN CONGRESS, JANUARY 11th, 1800.

(1 *Tucker's Blackstone, Appendix, p. 438.*)

THE General Assembly of Virginia would consider themselves unfaithful to the trust reposed in them, were they to remain silent, whilst a doctrine has been publicly advanced, novel in its principle and tremendous in its consequences: That the common law of England is in force under the government of the United States. It is not, at this time, proposed to expose at large the monstrous pretensions resulting from the adoption of this principle. It ought never, however, to be forgotten, and can never be too often repeated, that it opens a new tribunal for the trial of crimes never contemplated by the federal compact. It opens a new code of sanguinary criminal law, both obsolete and unknown, and either wholly rejected or essentially modified in almost all its parts by State institutions. It arrests, or supersedes, State jurisdictions, and innovates upon State laws. It subjects the citizens to punishment, according to the judiciary will, when he is left in ignorance of what this law enjoins as a duty, or prohibits as a crime. It assumes a range of jurisdiction for the federal Courts, which defies limitation or definition. In short, it is believed, that the advocates for the principle would themselves be lost in an attempt to apply it to the existing institutions of Federal and State Courts, by separating with precision their judiciary rights, and thus preventing the constant and mischievous interference of rival jurisdictions.

Deeply impressed with these opinions, the general assembly of Virginia instruct the senators, and request the representatives from this State, in Congress, to use their best efforts—

To oppose the passing of any law, founded on, or recognising the, principle lately advanced, 'that the common law of England is in force under the government of the United States,' excepting from such opposition such particular parts of the common law as may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; . . . and excepting, also, such other parts thereof as may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated.

IV.

(EXTRACT.)

THE UNITED STATES v. AARON BURR.

In the Circuit Court of the United States for the Virginia District.

(2 *Robertson*, 481.)

THURSDAY, September 3, 1807.

THE Chief Justice delivered the following opinion of the Court on the proper process to bring Aaron Burr before the Court to answer the indictment for the misdemeanor.

The question now before the Court is, whether bail be demandable from a person actually in custody, against whom an indictment for a misdemeanor has been found by a grand jury. As conducing directly to a decision of this point, the question has been discussed whether a summons or a *capias* would be the proper process to bring the accused in to answer the indictment, if, in point of fact, he were not before the Court.

It seems to be the established practice of Virginia in such cases to issue a summons in the first instance ; and if by any act of Congress the laws of the several States be adopted as the rules by which the Courts of the United States are to be governed in criminal prosecutions, the question is at an end: for I should admit the settled practice of the State Courts as the sound construction of the State law under which that practice has prevailed.

The 34th section of the Judicial Act, it is contended, has made this adoption.

The words of that section are, "that the laws of the several States, except where the Constitution, treaties, or statutes, of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply."

It might certainly be doubted whether this section (if it should be construed to extend to all the proceedings in a case where a reference can be made to the State laws for a rule of decision at the trial,) can comprehend a case where, at the trial in chief, no such reference can be made. Now in criminal cases, the laws of the United States constitute the sole rule of decision; and no man can be condemned or prosecuted in the Federal Courts on a State law. The laws of the several States, therefore, cannot be regarded as rules of decision in trials for offences against the United States. It would seem to me too that the technical term, "trials at common law," used in the section is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the Court sitting as a Court of equity or admiralty.

The provision of this section would seem to be inapplicable to original process, for another reason. The case is otherwise provided for by an act of Congress. The 14th section of the Judicial Act empowers the Courts of the United States "to issue all writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

This section seems to me to give this Court power to devise the process for bringing any person before it who has committed an offence of which it has cognisance, and not to

refer it to the State law for that process. The limitation on this power is, that the process shall be agreeable to the principles and usages of law. By which I understand those general principles and those general usages which are to be found not in the legislative acts of any particular State, but in that generally recognised and long established law, which forms the substratum of the laws of every State.

Upon general principles of law it would seem to me that in all cases where the judgment is to affect the person, the person ought to be held subject to that judgment. Thus, in civil actions where the body may be taken in execution to satisfy the judgment, bail may be demanded. If the right of the plaintiff be supported by very strong probability, as in debt upon a specialty, bail is demandable without the intervention of a Judge. If there be no such clear evidence of the debt, bail is often required upon the affidavit of the party. Now, reasoning by analogy from civil suits to criminal prosecutions, it would seem not unreasonable, where there is such evidence as an indictment found by a grand jury, to use such process as will hold the person of the accused within the power of the Court, or furnish security that the person will be brought forward to satisfy the judgment of the Court.

Yet the course of the common law appears originally to have been otherwise. It appears from *Hawkins* that the practice of the English Courts was to issue a *venire facias* in the first instance, on an indictment for a misdemeanor. This practice, however, is stated by *Blackstone* to have been changed. He says, (*vol. 4, p. 319*), "and so in the case of misdemeanors, it is now the usual practice for any Judge of Court of King's Bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant."

It is then the English construction of the common law, that although in the inferior Courts the *venire facias* might be the usual course, and although it had prevailed, yet that

a Judge of the King's Bench might issue a *capias* in the first instance.

This subject has always appeared to me to be in a great measure governed by the 33d section of the Judicial Act. That section provides, that for any crime or offence against the United States, the offender may, agreeably to the usual mode of process against offenders in that State where he is found, be arrested and imprisoned, or bailed, as the case may be.

This act contemplates an arrest, not a summons; and this arrest is to be not solely for offences for which the State laws authorise an arrest, but, "for any crime or offence against the United States." I do not understand the reference to the State law respecting the mode of process as over-ruling the preceding general words and limiting the power of arrest to cases in which, according to the State laws, a person may be arrested, but simply as prescribing the mode to be pursued. Wherever, by the laws of the United States, an offender is to be arrested, the process of arrest employed in the State shall be pursued; but an arrest is positively enjoined for any offence against the United States. This construction is confirmed by the succeeding words: the offender shall be imprisoned or bailed as the case may be. There exists no power to direct the offender, or to bind him without bail, to appear before the Court; which would certainly have been allowed had the act contemplated a proceeding in such a case which should leave the person at large without security. But he is absolutely to be imprisoned or bailed as the case may be.

In a subsequent part of the same section it is enacted, "that upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death."

There is no provision for leaving the person at large without bail; and I have ever construed this section to impose it as a duty on the magistrate who proceeds against any of-

fender against the United States to commit or bail him. I perceive in the law no other course to be pursued.

This section, it is true, does not respect the process upon an indictment. But the law would be inconsistent with itself if it required a magistrate to arrest for any offence against the United States—if it commanded him on every arrest to commit or to bail, and yet refused a *capias* and permitted the same offender to go at large, so soon as an indictment was found against him. This section, therefore, appears to me to be entitled to great influence in determining the Court on the mode of exercising the power given by the 14th section in relation to process.

On the impeachment which has been mentioned, this point was particularly committed to Mr. Lee, and the law upon it was fully demonstrated by him.

The only difficulty I ever felt on this question was produced by the former decision of Judge *Iredell*. If the State practice on this subject had been adopted, I should have held myself bound by that adoption. But I do not consider the State practice as adopted. *Mundell's* case was a civil suit; and the decision was, that the State rule respecting bail in civil actions must prevail. *Sinclair's* case was indeed a case similar to this; and in *Sinclair's* case a *venire facias* was issued. But I am informed by the Clerk that this was his act at the instance of the attorney, not the act of the Court. The point was not brought before the Court.

In *Callender's* case, a *capias*, or, what is the same thing, a bench warrant was issued. This was the act of the Court; but, not having been an act on argument, or with a view of the whole law of the case and of former decisions, I should not have considered it as over-ruling those decisions if such existed. But there has been no decision expressly adopting the State practice; and the decision in *Callender's* case appears to me to be correct.

I think the *capias* the more proper process; it is conformable to the practice of England at the time of our revolu-

tion, and is, I think, in conformity with the spirit of the 33d section of the Judicial Act. I shall therefore adopt it.

To issue the *capias* to take into custody a person actually in custody would be an idle ceremony. In such a case the order of the Court very properly supplies the place of a *capias*. The only difference between proceeding by *capias* and by order, which I can perceive, would be produced by making the writ returnable to the next term.

V.

REPORT

OF THE CASE OF THE UNITED STATES *v.* HUDSON & GOODWIN, AS DECIDED IN THE SUPREME COURT OF THE UNITED STATES, FEB. 15TH, 1812.

(7 *Cranch*, 32.)

THE UNITED STATES *v.* HUDSON & GOODWIN.

Absent WASHINGTON, Justice.

THIS was a case certified from the Circuit Court for the district of *Connecticut*, in which, upon argument of a general demurrer to an *indictment* for a libel on the President and Congress of the United States, contained in the *Connecticut Courant*, of the 7th of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the Judges of that Court were divided in opinion upon the question, *whether the Circuit Court of the United States had a common law jurisdiction in cases of libel?*

Pinkney, Attorney General, in behalf of the United States, and *Dana* for the defendants, declined arguing the case.

The Court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the Judges being present) by JOHNSON, J.

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a com-

H h

mon law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by Statute.

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favour of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organised for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other Courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorise them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation.

And such is the opinion of the majority of this Court: For, the power which Congress possess to create Courts

of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects; and when a Court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction—much more extended—in its nature very indefinite—applicable to a great variety of subjects—varying in every State in the Union—and with regard to which there exists no definite criterion of distribution between the District and Circuit Courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But without examining how far this consideration is applicable to the peculiar character of our Constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government, it would not follow that the Courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the State is not among those powers. To fine for contempt—imprison for contumacy—

inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others : and so far our Courts no doubt possess powers not immediately derived from statute ; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.

VI.

OPINION

OF MR. JUSTICE STORY IN THE CASE OF

THE UNITED STATES *v.* COOLIDGE,

In the Circuit Court of the United States, for the District
of Massachusetts, October Term, 1813.

(1 *Gallison*, 488.)

Indictment for a Misdemeanor.

Whether the Circuit Court of the United States has jurisdiction over common law offences against the United States ?

Story, J. The simple question is, whether the Circuit Court of the United States has jurisdiction to punish offences against the United States, which have not been previously defined, and a specific punishment affixed, by some statute of the United States.

I do not think it necessary to consider the more broad question, whether the United States, as a sovereign power, have entirely adopted the common law. This might lead to very elaborate inquiries, and the present question may well be decided, without entering upon the discussion.

I admit in the most explicit terms, that the Courts of the United States are Courts of limited jurisdiction, and cannot exercise any authorities which are not confided to them by the Constitution and laws made in pursuance thereof. But I do contend, that when once an authority is lawfully given, the nature and extent of that authority, and the mode, in

which it shall be exercised, must be regulated by the rules of the common law. In my judgment, the whole difficulty and obscurity of the subject has arisen from losing sight of this distinction.

Whether the common law of *England*, in its broadest sense, including equity and admiralty, as well as legal doctrines, be the common law of the *United States* or not, it can hardly be doubted, that the Constitution and laws of the *United States* are predicated upon the *existence* of the common law. This has not, as I recollect, been denied by any person, who has maturely weighed the subject, and will abundantly appear upon the slightest examination. The Constitution of the *United States*, for instance, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." I suppose that no person can doubt, that for the explanation of these terms, and for the mode of conducting trials by jury, recourse must be had to the common law. So the clause, that, "the judicial power shall extend to all cases in law and equity arising under the Constitution," &c. is inexplicable, without reference to the common law; and the extent of this power must be measured by the powers of Courts of law and equity, as exercised and established by that system. Innumerable instances of a like nature may be adduced. I will mention but one more, and that is in the clause providing, that the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. What is the writ of *habeas corpus*? What is the privilege which it grants? The common law, and that alone, furnishes the true answer. The *existence* therefore, of the common law is not only supposed by the Constitution, but is appealed to for the construction and interpretation of its powers.

There can be no doubt, that Congress may, under the Constitution, confide to the Circuit Court jurisdiction of all offences against the *United States*. Has it so done? The

judicial act of 24th of September, 1789, ch. 20. sect. 11, provides, that the Circuit Court "shall have exclusive cognisance of all crimes and offences *cognisable under the authority of the United States*, except where that act otherwise provides, or the laws of the *United States* shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognisable therein." No subsequent act has narrowed the jurisdiction; it remains therefore in full operation. The jurisdiction is not, as has sometimes been supposed in argument, over all crimes and offences specially created and defined by statute. It is of all crimes and offences "*cognisable under the authority of the United States,*" that is, of all crimes and offences, to which by the Constitution of the *United States*, the judicial power extends. The jurisdiction could not, therefore, have been given in more broad and comprehensive terms.

The Court then having complete jurisdiction, the next point will be to ascertain, what are crimes and offences against the *United States*. And here I contend, that recourse must be had to the principles of the common law, taken in connexion with the Constitution, in order to fix the definition, precisely as in other laws of Congress, we resort to the rules of the common law to give them an interpretation. For instance, Congress has provided for the punishment of murder, manslaughter and perjury, under certain circumstances; but it has no where defined these crimes. Yet no doubt is ever entertained on trials, that the explanation of them must be sought in and exclusively governed by the common law; and upon any other supposition, the judicial power of the *United States* would be left, in its exercise, to the mere arbitrary pleasure of the Judges, to an uncontrollable and undefined discretion. Whatever may be the dread of the common law, I presume, that such a despotic power could hardly be deemed more desirable.

The necessity and propriety of this principle will be rendered still more apparent upon a farther consideration. There

are a great variety of cases arising under the laws of the *United States*, and particularly those which regard the judicial power, in which the legislative will cannot be effectuated, unless by the adoption of the common law. Many cases may be governed by the laws of the respective States; but still whole classes remain, which cannot be thus disposed of. For example, in *Massachusetts* no Courts of Equity exist, and consequently no recognition of the principles or practices of equity, as contradistinguished from law. How then shall a suit in equity pending in the Circuit Court for that district be managed or decided? There is no law of the *United States*, which provides for the process, the pleadings, or the principles of adjudication. By what rules then shall the Court proceed? Certainly all reasoning and all practice pronounce, by the rules of equity recognised and enforced in the equity Courts of *England*. The illustration is yet more decisive, as to causes of admiralty and maritime jurisdiction; for these exclusively belong to the *United States*, and nothing in the laws or practice of the respective States can regulate the proceedings or the principles of decision. In my judgment, nothing is more clear, than that the interpretation and exercises of the vested jurisdiction of the Courts of the *United States* must, in the absence of positive law, be governed exclusively by the common law.

I would ask then, what are crimes and offences against the *United States*, under the construction of its limited sovereignty, by the rules of the common law? Without pretending to enumerate them in detail, I will venture to assert generally, that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade, and the public police OF THE UNITED STATES, are crimes and offences against the *United States*. From the nature of the sovereignty of the *United States*, which is limited and circumscribed, it is clear that many common law offences, under each of these heads, will still remain

cognisable by the States ; but whenever the offence is directed against the sovereignty or powers confided to the *United States*, it is cognisable under its authority. Upon these principles and independent of any statute, I presume that treasons, and conspiracies to commit treason, embezzlement of the public records, bribery and resistance of the judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the *United States*, would be offences against the *United States*. At common law, these are clearly public offences, and when directed against the *United States*, they must upon principle be deemed offences against the *United States*.

If then it be true, that these are offences against the *United States*, and the Circuit Court have cognisance thereof, does it not unavoidably follow, that the Court must have a right to punish them? In my judgment no proposition of law admits of more perfect demonstration. To suppose a power in a Court to try an offence, and not to award any punishment, is to suppose, that the legislature is guilty of the folly of promoting litigation without object, and prohibiting acts, only for the purpose of their being scoffed at in the most solemn manner. If therefore it authorise a trial of an offence, it must be deemed to authorise the Court to render such a judgment, as the guilt or innocence of the party may require. As to civil actions, the application of the principle has never admitted a doubt ; yet in no instance, that I recollect, is the form or the substance of the judgments prescribed by any law. These judgments, however, must unavoidably differ, not only in different actions, but in the same action, according to the nature of the claims and the pleadings of the parties. It is no answer to say, that the laws of the States will govern in such cases ; for these are not always applicable, as suits may be brought in the *United States* Courts, which are not cognisable by State Courts ; as for instance, equity and admiralty causes: And

farther, no such general and universal adoption of the practice or laws of the States has been authorised by Congress, or sanctioned by the Courts of the *United States*. The invariable usage of these Courts has been, in all cases not governed by State laws, to regulate the pleadings and pronounce the judgment of the common law. When I speak here of the common law, I use the word in its largest sense, as including the whole system of English jurisprudence. For the same reason, therefore, that governs in civil causes, I hold that the cognisance of offences includes the power of rendering a judgment of punishment, when the guilt of the party is ascertained by a trial.

But it may be asked, what punishment shall be inflicted? The common law affords the proper answer. It is a settled principle, that where an offence exists, to which no specific punishment is affixed by statute, it is punishable by fine and imprisonment. This is so invariably true, that, in all cases, where the legislature prohibits any act without annexing any punishment, the common law considers it an indictable offence, and attaches to the breach the penalty of fine and imprisonment.* I have no difficulty in saying, that the same rule must be held to exist here, for the same reason that it is adopted there. If, therefore, treason had been left without punishment by the act of Congress, I have no doubt, that the punishment by fine and imprisonment must have attached to the offence.

Upon what ground the common law can be referred to, and made the rule of decision in *criminal trials* in the Courts of the *United States*, and not in the *judgment or punishment*, I am at a loss to conceive. In criminal cases, the right of trial by jury is preserved, but the proceedings are not specifically regulated. The forms of the indictment and pleadings, the definition and extent of the crime, in some cases the right of challenge, and in all the admission

* *Com. Dig. Indict. D.*—3 *Co. 60.b.*—2 *Inst. 131.*—*Bac. Abrid. Fine D.*

and rejection of evidence, are left unprovided for. Upon what ground then do the Courts apply in such cases the rules of the common law? I can perceive no correct ground, unless it be, that the legislature have constantly had in view the rules of the common law, and deemed their application *in casibus omissis* peremptory upon the Courts.

The privilege of the writ of *habeas corpus* is so high and interesting, that it has become a prominent article in the Constitution; and the judicial act of the 24th of September, 1789, ch. 20, sect. 14, has authorised the Courts of the *United States*, and the Judges thereof, to issue that writ. But if nothing more could be done under it, than the legislature have expressly provided, it would be a mere dead letter for its most important purposes. It is only by engrafting on the authority of the statute the doctrines of the common law, that this writ is made the great bulwark of the citizen against the oppressions of the government.

I might enforce the view which I have already taken of this subject, by an examination in detail of the organisation and exercise of the judicial powers of the Courts of the *United States*, with reference to their equity, admiralty, and legal jurisdiction; but it cannot be necessary. If I am right in the positions, which I have already assumed and explained, there is an end of the question, which has been submitted. If I am wrong, the error is so fundamental, that I cannot hope to reach its source by any merely illustrative process.

The result of my opinion is, 1. That the Circuit Court has cognisance of all offences against the *United States*. 2. That what those offences are, depends upon the common law applied to the sovereignty and authorities confided to the *United States*. 3. That the Circuit Court, having cognisance of all offences against the *United States*, may punish them by fine and imprisonment, where no punishment is specially provided by statute.

I have considered the point as one open to be discussed,

notwithstanding the decision in the *United States v. Hudson & Goodwin*, February term, 1812, which certainly is entitled to the most respectful consideration; but having been made without argument, and by a majority only of the Court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, as it is not a question of mere ordinary import, but vitally affects the jurisdiction of the Courts of the *United States*; a jurisdiction which they cannot lawfully enlarge or diminish. I shall submit, with the utmost cheerfulness, to the judgment of my brethren, and if I have hazarded a rash opinion, I have the consolation to know, that their superior learning and ability will save the public from any injury by my error.

That decision, however broad in its language, has not, as I conceive, settled the question now before the Court, so far as it respects offences of admiralty and maritime jurisdiction. The Constitution has given to the judicial power of the *United States* the jurisdiction as "to all cases of admiralty and maritime jurisdiction," and this jurisdiction of course comprehends criminal, as well as civil suits. The admiralty is a Court of extensive criminal, as well as civil jurisdiction, and has immemorially exercised both. At least no legal doubt of its criminal authority has ever been successfully urged. By the law of the admiralty, offences, for which no punishment is specially prescribed, are punishable by fine and imprisonment; and as offences of admiralty jurisdiction are exclusively cognisable by the *United States*, it follows that all such offences are offences against the *United States*. We have adopted the law of the admiralty in all civil causes cognisable by the admiralty: must it not also be adopted in offences cognisable by the admiralty? It will perhaps be said, that express jurisdiction is given in civil cases of admiralty jurisdiction, but not in criminal cases. This is true in terms; but I contend, that criminal cases are necessarily included in the grant of cognisance of all "crimes and offences cognisable under the authority

of the *United States* ;” for crimes and offences within the admiralty jurisdiction are not only cognisable but cognisable *exclusively* under the authority of the *United States*. And Congress, in punishing certain offences upon the high seas, which are neither *piracies* nor *felonies*, have undoubtedly acted upon the conviction, that such offences were of admiralty and maritime jurisdiction.* Whatever room, therefore, there may be for doubt, as to what common law offences are offences against the *United States*, there can be none as to admiralty offences.

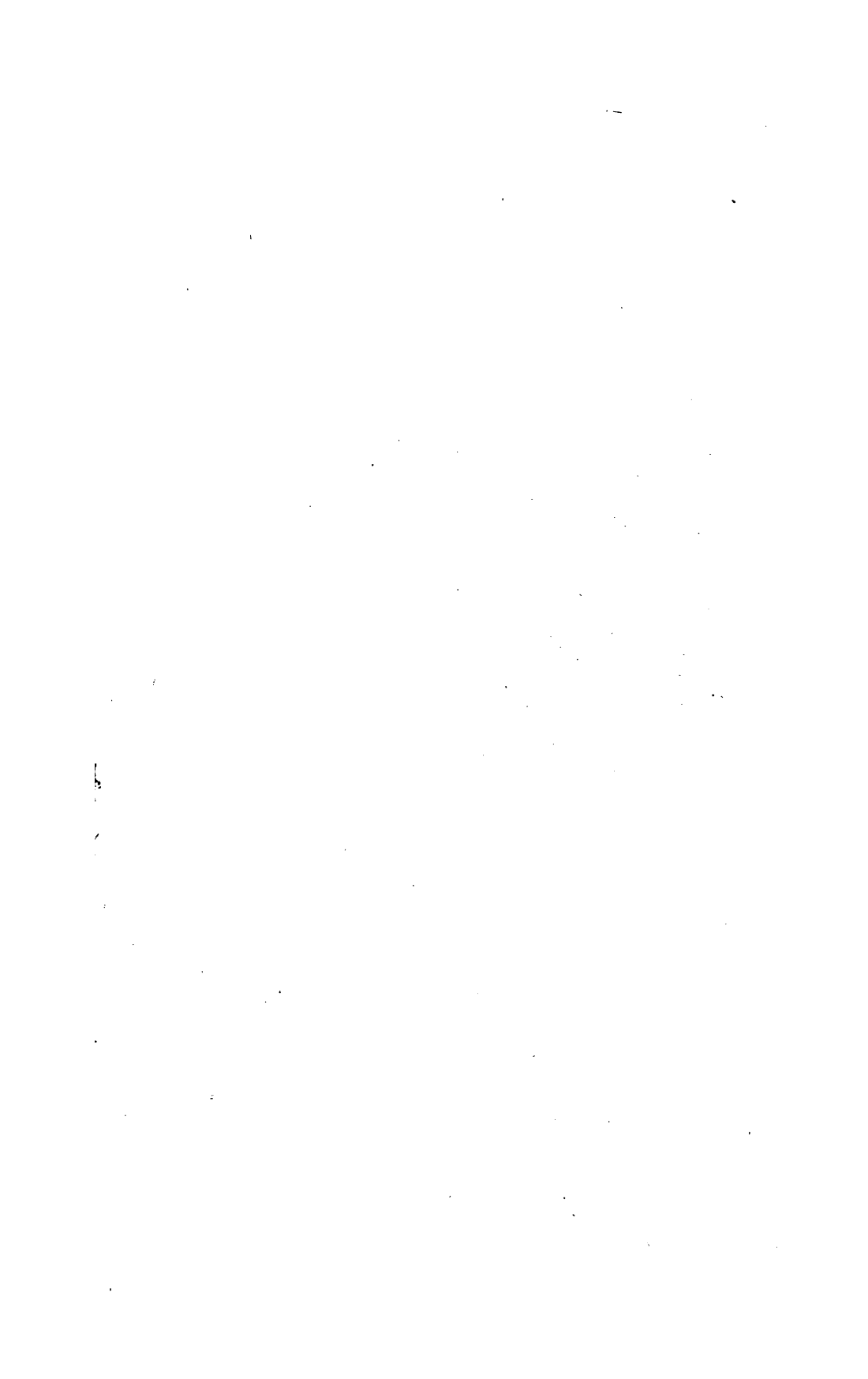
If this be true, then the reasoning, which I have before urged, applies in its full force, and I will not take up time in repeating it.

On the whole, my judgment is, that all offences within the admiralty jurisdiction are cognisable by the Circuit Court, and in the absence of positive law, are punishable by fine and imprisonment.

See 4 *Bl. Com.* 5, 44, 263.—2 *Bro. Cin. and Adm. Law.*

Davis, J. did not concur, with a view to bring the question solemnly before the Supreme Court; so it was certified to the Supreme Court, as upon a division of the Judges.

* See act 24th Sept. 1789, ch. 20, sect. 12, 13, 16, 17, &c.



VII.

REPORT

OF THE CASE OF THE UNITED STATES *v.* COOLIDGE, AS
DECIDED ON APPEAL IN THE SUPREME COURT OF THE
UNITED STATES, FEBRUARY TERM, 1816.

(1 *Wheaton*, 415.)

(CONSTITUTIONAL LAW.)

THE UNITED STATES *v.* COOLIDGE, *et al.*

Quare, whether the Courts of the United States have jurisdiction of offences
at common law against the United States?

THIS was an indictment in the Circuit Court of the district of Massachusetts, against the defendants, for forcibly rescuing a prize, which had been captured and taken possession of by two American privateers. The captured vessel was on her way, under the direction of a prize master and crew, to the port of Salem for adjudication. The indictment laid the offence as committed upon the high seas. The question made was, whether the Circuit Court had jurisdiction over common law offences against the United States? on which the Judges of that Court were divided in opinion.

The *Attorney General* stated that he had given to this case an anxious attention; as much so, he hoped, as his public duty, under whatever view of it, rendered necessary. That he had also examined the opinion of the Court, delivered at February term, 1813, in the case of the *United*

States v. Hudson and Goodwin. That considering the point as decided in that case, whether with, or without, argument, on the part of those who had preceded him as the representative of the government in this Court, he desired respectfully to state, without saying more, that it was not his intention to argue it now.

Story, J. I do not take the question to be settled by that case.

Johnson, J. I consider it to be settled by the authority of that case.

Washington, J. Whenever counsel can be found ready to argue it, I shall devote myself of all prejudice arising from that case.

Livingston, J. I am disposed to hear an argument on the point. This case was brought up for that purpose, but until the question is re-argued, the case of the *United States v. Hudson and Goodwin* must be taken as law.

Johnson, J. delivered the opinion of the Court.

Upon the question now before the Court a difference of opinion has existed, and still exists, among the members of the Court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the Attorney General has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the Court would not choose to review their former decision in the case of the *United States v. Hudson and Goodwin*, or draw it into doubt. They will, therefore, certify an opinion to the Circuit Court in conformity with that decision.

Certificate for the defendant.

VIII.

(EXTRACT.)

The Commonwealth of Pennsylvania v. Kosloff.

In the Court of Oyer and Terminer of the city and county of Philadelphia, January session, 1816.

(5 Serg. & Rawle, 545.)

Tilghman, C. J. The grand inquest for the city and county of Philadelphia, having preferred a bill of indictment against *Nicholas Kosloff*, Consul General of his Imperial Majesty the Emperor of Russia, a motion has been made to quash the indictment for want of jurisdiction in this Court. Two causes are assigned for our want of Jurisdiction. 1. That the privilege of immunity from criminal prosecutions, is conferred on consuls by the law of nations. 2. That by the Constitution of the United States, *exclusive jurisdiction* in all cases affecting consuls is vested in the Courts of the United States.

Mr. C. J. Tilghman decided the first question in the negative; but his argument on this point not relating to the matters treated of in this work, it is here omitted. On the second question, the Chief Justice proceeded to deliver his opinion as follows.

2. A more difficult question remains to be considered—Is the jurisdiction of this Court taken away, by the Constitution and laws of the United States? Before I go into an examination of the Constitution and laws, it may not be improper to say a word or two, respecting the subject in which this question arises. An agent of a foreign government, accused of a crime committed in the State of Pennsylvania, claims, not an exemption from trial, but the right

K k

of being tried by a Court of the United States. His public relations are, not with the State of Pennsylvania, but with the government of the United States: and if the Emperor of Russia should suppose that he had cause to complain of our treatment of his officer, he must address himself, not to the Governor of Pennsylvania, but to the President of the United States. But even where there was a cause of complaint, cases may be easily supposed, in which the President might think it more conducive to the peace of the nation, to send a foreign agent out of the country, to be punished by his own Sovereign, than to inflict punishment on him, by our own laws, here. These considerations are so manifest, that when the people of the United States were about to form a federal government, through which alone they were to maintain an intercourse with foreign nations, it would have seemed a want of common prudence, not to commit to that government the management of all affairs respecting the public agents of those nations. Let us now advert to the instrument of our Federal Union, and we shall soon perceive, that the statesmen who framed it, were perfectly aware of the importance of placing all foreign public agents, Consuls included, under the complete superintendence of the Federal Government. It was through the judicial power, that those persons could principally be affected. Accordingly we find it provided, by the 2d sect. of the 3d article of the Constitution, that the judicial power shall extend "to all cases affecting Ambassadors, other public ministers, and Consuls." Words more comprehensive cannot be devised. They include suits of every kind, civil and criminal. This is not denied by the Attorney General of Pennsylvania, nor, as I understand, is it denied, that by virtue of this provision, Congress had a right to declare by law, that in no case, civil or criminal, should a State Court have jurisdiction over a Consul. But it is contended, that until Congress does by law declare so, the State Courts have *concurrent* jurisdiction with the Courts of the United

States; or rather, that in the case before us, the State Courts *alone* have jurisdiction, because, Congress having passed no law defining the crime, or the punishment of rape, the Courts of the United States cannot take cognisance of the offence. The Constitution in the 1st section of the 3d article, declares in what Courts the judicial power shall be vested, *viz.* "in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."—In the 2d section, it enumerates the different cases to which the judicial power shall extend, and then goes on to direct the distribution of that power among the different Courts.—"In all cases affecting Ambassadors, other public ministers, and Consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction: in all the other cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such exceptions, and under such restrictions, as the Congress shall make." Thus the judicial power, extending to all cases affecting Consuls, and that portion of it which respects Consuls, being vested in the Supreme Court, it follows, that as soon as the Supreme Court was organised by law, it became immediately vested with original jurisdiction in every case by which a Consul might be affected. But was this an exclusive jurisdiction? The opinion of the Supreme Court, *Marbury v. Madison*, 1 *Cranch*, 137, goes far towards establishing the principle of exclusive jurisdiction. The point decided in that case, was, that where the Constitution had vested the Supreme Court with appellate jurisdiction, it was not in the power of Congress to give it original jurisdiction; and the whole scope of the argument maintained in the Court's opinion, goes to prove, that where the Constitution had given original jurisdiction, it was not in the power of Congress to give appellate jurisdiction. This will appear from the following extract from that opinion. "If Congress remains at liberty "to give this Court appellate jurisdiction, where the Consti-

"tution has declared their jurisdiction shall be original, the
 "distribution of jurisdiction made in the Constitution, is form
 "without substance. Affirmative words are often, in their
 "operation, *negative* of other objects than those affirmed, and
 "in this case, a negative, or *exclusive* sense must be given to
 "them, or they have no operation at all. If the solicitude
 "of the Convention, with respect to our peace with foreign
 "powers, induced a provision that the Supreme Court should
 "take original jurisdiction in cases which might be supposed
 "to affect them ; yet the clause would have proceeded no fur-
 "ther than to provide for such cases, if no further restriction
 "on the power of Congress had been intended. That they
 "should have *appellate* jurisdiction in all *other* cases, with such
 "exceptions as Congress might make, is no restriction, unless
 "the words be deemed exclusive of original jurisdiction."
 Now taking this to be the construction of the Constitution,
 all these parts of the "act to establish the judicial Courts of
 the United States," which vest jurisdiction in cases affecting
 Consuls, in the District or Circuit Courts, would be uncon-
 stitutional and void. And, if it was intended by the Con-
 stitution, that no inferior Court of the United States should
 have jurisdiction, it cannot be supposed that a State Court
 was to have it, because there is much stronger reason for
 denying it to the State Courts, than to the inferior Courts
 of the United States. It will be perceived, that this
 principle shakes the decision in the case of *Ravara*, who was
 convicted in the Circuit Court, though not that part of the
 decision which respects the privilege of a Consul. But if
 the two cases cannot be reconciled, the Circuit Court must
 give way. Supposing, however, for arguments' sake, that
 the Constitution does not vest the Supreme Court with *ex-
 clusive* jurisdiction ; let us see whether Congress has not
 excluded the State Courts by the judiciary act, passed 24th
September, 1789. By the 9th section, the District Courts are
 vested *exclusively* of the Courts of the several States, with
 cognisance of "all crimes and offences that shall be cogni-

sable under the authority of the United States, committed within their respective districts, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding 100 dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Consuls are embraced in this jurisdiction, as plainly appears by considering the whole section, and as was declared by this Court, in *Manhardt v. Soderstrom*, (1 Binn. 138.) Then comes the 11th section ; by which the Circuit Courts are vested with *exclusive cognisance* of "all crimes and offences cognisable under the authority of the United States, except where the said act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts, of the crimes and offences cognisable therein." Does not this exclude the State Courts from jurisdiction in the case of Consuls? The only argument attempted, or that can be devised, in support of the negative, is, that no offence is cognisable in any Court of the United States, until Congress has declared it to be an offence, and prescribed the punishment. This is the only consideration which ever had the least weight in my mind. But upon mature reflection, I am unable to deny, that the Courts of the United States can take cognisance, when I find it written in the Constitution, *that the Supreme Court shall have jurisdiction in all cases affecting a Consul*. Is he not affected in criminal cases, much more than in civil? How then can I say, that the Supreme Court has no jurisdiction? But how, or by what law is he to be punished, in case of conviction? Shall he be punished by the law of *Pennsylvania*, where the offence was committed, inasmuch as there is no other express law which reaches his case? And it is on account of the *person only* that jurisdiction is given to the Courts of the United States. Does the 34th section of the judiciary act apply to the punishment of offences, by which it is enacted, "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall

otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply?" May a person convicted in a Court of the United States, of a crime of the highest grade, concerning which Congress has made no provision, be punished, according to the opinion of Judge STORY, in *The United States v. Coolidge*, 1 *Gallison's Rep.* 488, by fine and imprisonment, on the principles of the common law. Or is the Constitution to be so construed, as to exclude the jurisdiction of all inferior Courts, and yet suffer the authority of the Supreme Court to lie dormant, until called into action by a law which shall form a criminal code on the subject of Consuls? These are questions which may embarrass those who have to answer them, but are not necessary to be answered here. No embarrassment, however, could equal that into which this Court would be thrown, should it determine, that no Court of the United States has jurisdiction, in a case which affects a Consul *in every thing short of life*, when the Constitution declares, that the Supreme Court shall have jurisdiction *in all cases affecting him*. Upon full consideration, I am of opinion that the indictment should be quashed, because this Court has no jurisdiction.

Brackenridge, J. concurred in the opinion to quash the indictment, because *exclusive jurisdiction* was vested in the Courts of the United States. Concerning the privileges of a Consul he did not think it necessary to give an opinion.

Indictment quashed.

Enc. Jy.

ERRATA.

This mark † is intended to shew that the lines are to be counted from the top of the page, and this ‡ from the bottom of the text. The letter n, means that the error is in the notes.

Page 1, line 4 † after the words "of the same State," add "claiming lands under grants of different States"

P. 3, line 5 † n. for "into," read "in."

P. 4, line 1 † for "appears," read "appear."

P. 7, line 17 † for "on which it was called," read "which it was called upon."

— line 7 † after the word "law," add a note of interrogation, ?

P. 12, line 10 † for "obiter," read "obiter."

P. 15, line 7 † n. for "ibid," read "ibid."

P. 50, line 1 † dele "turn."

P. 57, line 16 † for "proceeding," read "proceedings."

— line 19 † for "forma," read "is."

P. 82, line 8 † for "Arkansaw," read "Arkansas"

— lines 14, 15 † for "governments have," read "government has"—
and for "statutes," read "statute."

P. 187, lines 2, 3 † for "efforts," read "effects."

69 line 5 † for "continuation" read "continuation"
67 "of" dele "the."
187 "7" for "every" read "every."







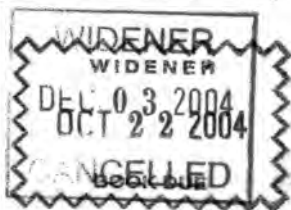
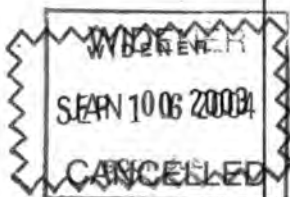


3 2044 055 000 699

The borrower must return this item on or before the last date stamped below. If another user places a recall for this item, the borrower will be notified of the need for an earlier return.

*Non-receipt of overdue notices does **not** exempt the borrower from overdue fines.*

Harvard College Widener Library
Cambridge, MA 02138 617-495-2413



Please handle with care.
Thank you for helping to preserve
library collections at Harvard.

